No. 2272

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN-PACIFIC CONSTRUCTION COMPANY (a corporation),

Plaintiff in Error,

vs.

MODERN STEEL STRUCTURAL COMPANY (a corporation),

Defendant in Error.

REVISED ORIGINAL AND SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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Introductory.

Within the time specified by the rules of this court, plaintiff in error served and filed its original brief. During counsel's preparation for the oral argument several glaring substantive errors in orthography, composition and references to the "Transcript of Record" were discovered, and therefore to save the court unnecessary labor and to present clearly the position of the plaintiff in error

its request for permission to prepare and file a revised and supplemental brief was granted.

The original brief need not be read as this revised and supplemental brief, for the convenience of all, will include all the matters contained in the original brief as well as such additional points and authorities as, in the judgment of counsel, sustain the contention of plaintiff in error; and it will also contain a discussion of the points urged in the brief of the defendant in error. Therefore this brief will contain in the following order

1. *Statement of the case.*
2. *Assignment of Errors.*
3. *Argument.*
4. *Discussion of Position of Defendant in Error.*

I.

Statement of the Case.

This is an action at law for damages for an alleged breach of contract. The defendant in error had judgment in the lower court for $17,372.

The facts of the case may be summarized as follows:

Shortly after the San Francisco disaster of April 18, 1906, the "Richelieu Realty Syndicate", a California corporation, leased the premises in the City and County of San Francisco known as

the southeast corner of Geary Street and Van Ness Avenue for the purpose of erecting thereon an eight-story *combined office building and theatre* (Tr. p. 106). The American Pacific Construction Company (plaintiff in error) a California corporation, was organized in the latter part of the year 1906 for the general purpose of erecting buildings, but not for *the fabrication of, or the erection of,* the steel members of a building. The Modern Steel Structural Company (defendant in error) is and for many years prior to the year 1906 was, and ever since has been, a Wisconsin corporation, with its plant at Waukesha, Wisconsin, organized for the special purpose of manufacturing, fabricating and erecting steel structures of all kinds (Tr. pp. 75-76). S. B. Harding, president of the Modern Steel Structural Company (defendant in error) was in San Francisco when "The Richelieu Realty Syndicate" was seeking bids for the structural steel and iron work required for its proposed building. He was then counselling the American Pacific Construction Company to open a structural steel shop at San Francisco and promised to aid it in establishing such shop by interesting himself in it and sending men to operate the plant (Tr. p. 80; p. 92). While thus advising with it he suggested that the American Pacific Construction Company, plaintiff in error, bid for the steel work for the proposed Richelieu Realty Syndicate Building and, if successful, sublet the work to the defendant in error,

the Modern Steel Structural Company. It was argued that the bid of the plaintiff in error, a local concern, would receive more favorable consideration than that of the defendant in error. Mr. Harding, president of the defendant in error, knowing that the plaintiff in error was unfamiliar with the steel business supervised the entire affair and offered to, and did, plan the contract which plaintiff in error proposed to the Richelieu Realty Syndicate (Tr. p. 84; p. 85, bottom page 86 and p. 87; p. 90; p. 91; p. 96). The proposition as planned by Mr. S. B. Harding was submitted to "The Richelieu Realty Syndicate" and accepted (Tr. p. 84). The first acceptance was verbally given on or about the 22nd day of December, 1906 (Tr. p. 82). Pursuant to the understanding that the work was to be sublet to it, the Modern Steel Structural Company sent to the plaintiff in error early in January, 1907, for its acceptance a proposal in the following words:

"PROPOSAL FROM MODERN STEEL STRUCTURAL CO.
Waukesha, Wis., Jan. 4, 1907.

American Pacific Construction Co.,
San Francisco, Cal.

We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner, described as follows and in accordance with the *drawings furnished by Jos. D. Smedberg* AND *specifications also furnished by J. D. Smedberg,* identified with marks: 'Copy #1' Initialed, 'S. B. H. 12-30-06', excepting as noted under 'remarks' on sheet #2 attached.

Namely, the structural steel and iron (except the grillage beams, bolts, separators and column bases mentioned on page 3, of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; Location—Southeast corner of Van Ness & Geary St., San Francisco, Cali.

Delivery: as follows: *That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S dated by us on back of print as received Jan. 3, 1907,* required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

Remarks: Our proposition is based on the substitution in part (as referring to *'kind, character and finish of materials'* beginning page 9 and *'inspection'* beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed, as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the American Pacific Construction Company, at their own expense, will weigh same at the Public Scales

in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the AMERICAN PACIFIC CONSTRUCTION COMPANY, the amount overpaid us.

Price to be Seventy-seven dollars ($77.00) per ton; Freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee Exchange, free of expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates and their expenses, while so delayed.

This contract in contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements or understandings outside of this contract and that no agent or salesman has any authority to obligate the MODERN STEEL STRUCTURAL COMPANY by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the MODERN

Steel Company until the same has been fully paid for in Cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any differences of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.

Ship via:

Modern Steel Structural Co.,
Accepted Jany. 17th, 1907, by S. B. H.
Approved by S. B. Harding, Pres.
American Pacific Construction Co.,
Thomas Vigus, General Manager."

The pertinent portions of the "specifications" referred to are as follows (Tr. pp. 106, 107, 108, 109, 110, 111):

"San Francisco, December 21, 1906.

"In order to understand the business relations involved in the following specifications, some explanation of them is necessary.

"*Mr. Joseph D. Smedberg, the consulting engineer, is under contract with Mr. Frank T. Shea, architect,* to furnish those parts of the plans and specifications for the building which relate to the iron and steel frame and reinforced concrete work.

"*He is also under contract with the Richelieu Realty Syndicate to supervise the inspection,*

to superintend the erection of the steel frame work, to check all bills rendered by the contractors for this portion of the work, and, in general to see that all the contracts relating to this part of the building are faithfully fulfilled. * * *

"GENERAL:

"The steel construction described in these specifications is that *for a new office building and theatre,* Southeast corner of Van Ness Avenue and Geary Street, San Francisco, Cal. The building is in plan 149′ x 120′ 0″, and is eight stories high above the sidewalk, with basement extending 20′ 3″ below ground. (Datum).

"The plan of construction is as follows:

"THE GENERAL PLANS FOR THE THEATRE PORTION OF THE BUILDING BEING INCOMPLETE STILL, THE INTENTION IS TO ERECT THE OFFICE BUILDING PORTION FIRST, AND ESPECIALLY RUSH WORK ON THE FIRST SECTION COLUMNS, FIRST AND SECOND STORY BEAMS AND SIDEWALK BEAMS. OPEN HOLES IN COLUMNS, BEAMS AND GIRDERS FOR CONNECTING THEATRE CANTILEVERS, etc., *will be drilled in the field,* AS ARRANGEMENT OF THEATRE FRAMING CANNOT BE DETERMINED ACCURATELY AT PRESENT, and this method will not delay any portion of the office building construction, due to lack of information regarding connection.

"The contract for grillage, beams and cast-iron pedestals will be made separately in order to have foundations ready for first delivery of steel work, and cause no delay in the erection of frame.

"SPECIFICATIONS EXPLAINED:

"These specifications are supplemental to the contract already entered into for the constructional iron and steel work of this building between The American Pacific Construction Company, parties of the first part, and Riche-

lieu Realty Syndicate, parties of the second part. They are the specifications referred to in the said contract, and which are to be considered a part of that contract.

"The specifications intended to cover all the structural iron work for frame and reinforced concrete in said building. They are intended to co-operate with the drawings for the same, both those furnished by the architect, and those furnished by the engineer, as hereinafter specified, and what is called for by either is as binding as if called for by both. They are intended to describe and provide for a finished piece of work. * * *

"When necessary, or desirable, he [the contractor] must apply to the architect, or the engineer, for further details or specifications during construction or before proceeding with his work.

* * * * * * *

"Reference in Case of Dispute:

"Should any difference of opinion or dispute arise in relation to the meaning of these specifications, or of the said drawings, furnished by either the architect or the engineer, as hereinafter specified, reference must be made to the engineer Joseph D. Smedberg, whose decisions on all such points shall be final and conclusive.

"Drawings:

"The general dimensions, arrangements and sections required for the structural iron work herein specified are shown on the general structural iron drawings prepared and furnished by the engineer. * * *

"Detail or shop drawings required by the contractor, including drawings of every part and piece of the work, with all the lists, schedules, indexes, erection plans or other directions necessary for the proper manufacture,

finish and erection of the work covered by these specifications and the said general drawings will be made and furnished by the engineer. * * *

"ORDERS:

"All materials required to be furnished or work to be done under these specifications or by the said general structural iron drawings will be ordered by the engineer from time to time with the shop drawings, lists, schedules, etc., for the same as fast as they can be prepared, *and the contractor for the structural iron work must order no material and perform no work under these specifications until he has received the said detail drawings, lists and schedules for the same.* * * *"

In connection with the foregoing quotations, we desire to call attention particularly to the fact that neither proposal nor specifications described the character or quantity of the structural material the furnishing of which was in contemplation. That matter was left for determination *by means of drawings thereafter to be prepared by the engineer, representing, not The American Pacific Construction Company, the plaintiff in error, but the Richelieu Realty Syndicate.* It further appears from said quotations that the matter of definite provision for the work of putting up the steel frame for this large, eight-story building was in a very incomplete state, subject to various contingencies, and big with possibilities of the uncertainty and delay which afterwards developed in the attempt to get a "starting point" (Tr. pp. 224; 227) for the contemplated

contract work. As shown by letters written by the plaintiff and by the testimony of S. B. Harding, hereinafter referred to, these difficulties were fully appreciated at all times by the defendant in error and its officers.

The acceptance of said proposal by the American Pacific Construction Company on the 15th day of January, 1907 (Tr. p. 102), constitutes the *alleged contract* for the *alleged breach* of which the jury declared that the defendant in error was damaged in the sum of seventeen thousand three hundred and seventy-two dollars ($17,372).

The drawings referred to in the said proposal *were never completed.* There were *no drawings whatever* for the theatre portion of the proposed building. *None was ever made* (Tr. pp. 108, 165, 255). Without completed drawings there was no means, except by "guessing" by which the jury or any one could ascertain the number of tons of steel required for the proposed building, and therefore nothing upon which to base a judgment for damages (Tr. pp. 248, 241, 235, 225).

On the first of March, 1907, defendant in error shipped from Waukesha, Wisconsin, to plaintiff in error thirty-nine and one quarter (39¼) tons of fabricated steel of the value of $3021.09. This is the only steel fabricated or shipped by defendant in error under the said alleged contract, or at all (Tr. p. 231).

On April 8, 1907, for the first time it became apparent to the plaintiff in error that the Richelieu Realty Syndicate was a financial wreck and unable to carry out its contract and plaintiff in error immediately telegraphed defendant in error to stop all work, and later advised defendant in error that the Richelieu Realty Syndicate was hopelessly insolvent and had abandoned its contract with the American Pacific Construction Company (Tr. p. 20, p. 132, p. 133, p, 137). When it was apparent beyond any question that the Richelieu Realty Syndicate was unable to carry out, and had abandoned, the contract, plaintiff in error, on the 13th day of April, 1907, telegraphed defendant in error (Modern Steel Structural Company) to wire its outside figure for the settlement of its claims under the alleged contract it had with the plaintiff in error. In doing this the American Pacific Construction Company was not only proceeding along the lines of fairness but was true to the business friendship which it thought had been established between it and the defendant in error and out of which arose the alleged contract in question (Tr. p. 135). No reply was received to this wire and on the 15th day of April, 1907, the plaintiff in error wrote for this figure and asked defendant in error in fixing its loss to remember that plaintiff in error would sustain a heavy loss on its main contract in addition to any sum paid to defendant in error (Tr. p. 137). In reply defendant in error asked $30,230 in satisfaction of alleged damages caused by the cancellation of

the contract, only one thirty-seventh of which, according to its own story, had been performed, and on the full performance of which only $115,500 was to be paid (Tr. p. 138, p. 46). In other words, it claimed damages in the sum of $30,230 for the non-fulfillment of a contract, which, if fulfilled required the payment only of $115,500. Pursuant to requests from plaintiff in error different itemized statements of these damages were furnished but no two of them agree.

By its letter of May 28, 1907, the items of the alleged damages are specified as follows:

Material as per accompanying 4 sheets—weight—275,481 lbs. at $1.90 unloaded in our yard	$ 5234.14
Car of steel invoiced	3021.09
Expenses and money advanced J. D. Smedberg	350.00
Shop Drawings	1441.53
UNUSED SHOP SPACE LYING IDLE	20,183.24
Total	$30,230.00

(Tr. p. 149).

J. D. Smedberg was *the representative of the Richelieu Realty Syndicate and of its architect* (Tr. pp. 104, 127, 223). Yet money loaned to him was charged against plaintiff in error as part of the cost of doing the work under the alleged contract.

By its letter of the 15th of October, 1907, defendant in error wrote that the above figures were made

up "somewhat hurriedly" [request for them was made April 22, 1907 (Tr. p. 140) and they were furnished by letter dated May 28, 1907,—thirty-six days later—(Tr. p. 149),] and, therefore the figures given under date of May 28, 1907, were more or less approximate. But by October 15, 1907, it had ample time to consider its damages and to detail the items and thus detailed they made the total sum of $30,931.23 (Tr. p. 211). This was its second appraisement of its damage (Tr. p. 211). In this appraisement it added to the actual cost of the raw material and the cost of fabrication various percentages of such costs and this added sum is called "overhead expenses" and is included as part of the cost of performing the contract (Tr. pp. 211, 216, especially 214).

In its first complaint its third appraisement fixes its damages at $30,881.23 (Tr. p. 10) while by its fourth appraisement contained in its amended complaint the total damage is fixed at *$35,164.17* (Tr. p. 147).

Mr. S. B. Harding, *president of the defendant in error,* makes the fifth appraisement of the alleged damage and fixes it at $34,470 (Tr. p. 165). *And although the "overhead expenses" of the defendant in error apportionable to this contract* (Tr. p. 164) *amounting to $7171.23 monthly* (Tr. p. 164) which were included as part of the cost of the performance of the contract in the second appraisement, are omitted by Mr. S. B. Harding in his appraise-

ment the total damages pivot about the mystical sum of $30,000.

F. W. Harding, vice-president of the defendant in error, offers the sixth appraisement of the damage sustained by the defendant in error by breach of the alleged contract and fixes it at $29,637.00 (Tr. bottom page 186). He did not include in his estimate of the cost of performing the alleged contract the share of the *"overhead expenses"* chargeable to this contract (Tr. p. 187).

The president of the defendant in error (Tr. p. 156) and its vice-president (Tr. p. 186) testified to the amount of the alleged damage, and its secretary gave his appraisement in writing (Tr. pp. 211-216). There was absolutely no agreement among them on the cost of performing the contract, or in any particular except in the amount of damage. Each guessed an amount in the neighborhood of $30,000 as the profit the defendant in error would have made if the contract had been performed, notwithstanding that on January 25, 1907, the defendant in error did not consider the contract profitable for, through its president, it wrote to the plaintiff in error:

> *"If you desire to buy the job elsewhere and not give the $77.00, we would be very much pleased to relieve you, only asking you to pay us what we have already done"* (Tr. p. 189); and

again on the 31st day of January, 1907, its president in effect said that THERE WAS NO PROFIT in the

alleged contract with the plaintiff in error, writing as follows:

> "We felt in the whole transaction that we were more *carrying out the obligations made by G. W. Harding, of Los Angeles, than anything else, as we were so filled up with work and the writer further said that we would be pleased if we could sublet it to someone and get out* EVEN *and at the same time serve you,* but if we could not, we were going to stick by and fill the order" (Tr. p. 196).

In the beginning the defendant in error was convinced that the alleged contract could not be performed by it except at a loss. This conviction possessed its president even after the contract was signed and as late as January 31st, 1907 (Tr. p. 196). But when the American Pacific Construction Company on the 7th day of April, 1907, notified defendant in error that the bankrupt condition of the Richelieu Realty Syndicate made the performance of the contract impossible, then the opinion of all its officials changed radically. The American Pacific Construction Company's (plaintiff in error) "unfamiliarity" (Tr. pp. 86, 87) and "inexperience" (Tr. p. 85) with steel work, its confidence in the *defendant in error,* invited and reposed pursuant to the injunction written by defendant in error to plaintiff in error on the 21st day of December, 1906, in the following language:

> "You will have to put yourself in our hands to do the right thing by you * * *" (Tr. p. 91).

the bankruptcy of the Richelieu Realty Syndicate, its consequent inability to carry out its contract with the plaintiff in error, and therefore the impossibility of the latter performing its alleged contract with the defendant in error presented to defendant in error an opportunity for it to coin these misfortunes into a profit of thirty thousand dollars.

Generally in cases of this character it is almost impossible for the defendant to dispute the claim of plaintiff that the cost of performance would be less than the contract price. The claimant of damages declares how much less than any other person he can manufacture an article or carry out contract. Fortunately for the plaintiff in error the legal principles applicable to the case at bar destroy the very foundation of the claim for damages by declaring the alleged contract void. But if this were not so the many points raised by the assignments of error demand the reversal of the judgment.

The questions raised on this writ of error relate to the following propositions:

1. The proposal of the defendant in error and its alleged acceptance by the plaintiff in error did not constitute a valid, or any, contract.

(a) It was incomplete because, although it contemplated furnishing all the structural steel required for a building to be constructed in accordance with drawings and specifications to be furnished by Joseph D. Smedberg, such drawings were

never made and the specifications were never completed and therefore there was no means of knowing or determining the character and quantity of steel to be furnished.

(b) Neither drawings nor specifications were ever attached to, nor made part of, said proposal and neither the drawings nor the specifications were ever completed. The partially completed specifications referred to drawings for the description of character and quantity of material, but such drawings were never completed. Therefore, it was impossible for either party to know the quantity of steel to be fabricated; the manner in which it was to be fabricated, or the size, form, weight, or appearance of the various steel members entering into said building, or the cost of fabricating the same. The said alleged contract is uncertain and indefinite inasmuch as it does not show, nor in any manner indicate the amount of steel to be fabricated, or the size (long, short, broad or narrow) weight (light or heavy), form, appearance or style into which the various steel members of the proposed building were to be fabricated.

Therefore, the defendant in error never could fabricate the steel required for the building—the drawings and design for which were never furnished; until they were finished even the architect of the proposed building could not describe any of its members, even though, in his mind he might

have had formed some conception of its exterior design. No architect, engineer or other person could estimate the quantity without the drawings, as without them there could be no basis for such estimate.

2. There was no proof of damage. Even if the alleged proposal and acceptance had constituted a valid contract, there is absolutely no evidence of damage, except in the sum of $3021.09, the amount spent in part performance of the contract, all other damages being the result of pure speculation and conjecture. The proposal was too indefinite to establish a sufficient predicate for fixing any damages.

3. There was a variance between the contract alleged and the one sought to be proved, in the following particulars:

(a) It was alleged that the contract was for an agreed amount of steel, to wit: 1500 tons. The testimony shows simply a proposal to furnish the structural steel required for the Columbia Theatre Building to be shown by the drawings and specifications to be furnished by Joseph D. Smedberg and no such drawings were ever prepared or furnished.

(b) The contract alleged provided delivery of all fabricated steel at San Francisco, on or before September 1, 1907, at $77.00 per ton, f. o. b. San Francisco; while the testimony only tended to sustain an alleged contract for steel at $77.00 per

ton, freight allowed to San Francisco and deliveries to be made as follows:

> "That portion indicated by Mr. Smedberg shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S, dated by us on back of print as received, Jan. 3, 1907, required to begin the erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.
>
> Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg."

4. The action is premature. If the contract is valid, then any difference concerning it or the work done under it was by its terms to be settled by arbitration. The defendant in error has never arbitrated or offered to arbitrate the dispute involved in this action. This clause was inserted by the defendant in error and is a condition precedent to its right of action.

Question one (1) above is raised on exceptions:

(a) To the ruling of the court admitting in evidence the proposal of defendant in error, dated January 4, 1907, and being plaintiff's Exhibit "K" and plaintiff's Exhibit No. 3 (Tr. p. 99).

(b) To the ruling of the court in allowing witness, Samuel B. Harding's answer, over objection by plaintiff in error, the following question: "Does

it indicate the acceptance of the contract'' (Tr. p. 104).

(c) To the ruling of the court admitting in evidence over the objections of plaintiff in error certain alleged incomplete specifications, made by Frank T. Shea and Joseph D. Smedberg and marked Exhibit "M" (Tr. p. 105).

(d) To the ruling of the court in admitting in evidence over the objections of the plaintiff in error certain 31 sheets of detail drawings (Tr. p. 125).

(e) To the ruling of the court allowing the witness Samuel B. Harding, over the objections of plaintiff in error, to answer the question "Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?" (Tr. p. 128).

(f) To the ruling of the court refusing to grant the motion of counsel for plaintiff in error to strike out the following answer of witness Samuel B. Harding "And my reasons for that statement would be this: The American Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of *14* or 1500 tons as I remember. Now the architect's plans—I am speaking now of the original plans from which we made our detail drawings—*were incomplete at the time we began work,* and Mr. Smedberg came up for the purpose of completing these drawings and

insofar as we went in examining the original drawings prepared by the architect we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit 'O' calling attention to the discrepancies and I, therefore, from such investigations and discrepancies found, think that the building would run up the 1500 ton mark, if not more, and these increases spoken of are 20 per cent or 25 per cent. Of course this would not apply to all the structure" (Tr. pp. 130-131).

(g) To the ruling of the court in allowing witness Frederick Hoffman, over the objection of counsel for defendant (plaintiff in error) to answer the following question: "From your examination of the drawings and specifications of the building in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?" (Tr. p. 177).

(h) To the ruling of the court denying the motion for non-suit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

(i) To the refusal of the court to instruct as a matter of law that as the drawings which were a material part of the contract were never completed the contract was void and the verdict must be for the defendant (Tr. p. 280).

(j) To the refusal of the court to instruct the jury that unless the plaintiff established by a preponderance of evidence the following elements, to wit: the existence of a contract, containing plans and specifications; the character of the work to be done, the price, the quantity to be delivered and time of delivery and that the cost to plaintiff in carrying out such a contract was less than the contract price, the verdict must be for the defendant (Tr. p. 281).

(k) To the refusal of the court to instruct as a matter of law, as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation, for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract or if you conclude that there was a contract but that the damages claimed are too speculative or remote, your verdict should be for the defendant, because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor (Tr. p. 287).

(l) To the refusal of the court to instruct as a matter of law, as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: we cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff

weighs just the same as that of the defendant, you must find for the defendant, that is the law. The plaintiff can only recover when his testimony outweighs that of the defendant (Tr. p. 288).

(m) To the instruction of the court to the effect that there was under the evidence but one question left for the jury to determine in reaching a verdict and that is the amount of damages plaintiff suffered through the breach of contract sued on (Tr. pp. 288-289).

(n) To the instruction of the court given as follows:

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer the evidence shows without any conflict whatsoever, that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished and that plaintiff at the direction and request of defendant had entered upon its execution so that, for all purposes affecting the rights of the parties herein involved, the contract

is to be regarded as having been duly executed, as to the alleged breach of the contract by the defendant, the action of the defendant as disclosed by the correspondence between the parties and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon (Tr. pp. 289-290).

Question 2 above is raised on exceptions

(a) Same as are specified as being raised by question 1.

(b) To the ruling of the court sustaining the objection of counsel for plaintiff (defendant in error) to question asked Thomas Vigus, to wit: "With whom did you have that conversation?" (Tr. p. 181).

(c) To the ruling of the court denying the motion for nonsuit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

(d) To the refusal of the court to instruct as a matter of law, as follows:

In its third amended complaint on file plaintiff alleges: that on the 19th day of January, 1907, a

contract was made with the defendant whereby plaintiff agreed to deliver f. o. b. cars San Francisco, California, at $77 per ton the quantity of structural steel and iron required by plans and specifications for the Columbia Theatre Building, recited in said alleged contract, which quantity plaintiff estimates at approximately 1500 tons, and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907.

I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant (Tr. p. 281).

(e) To the ruling of the court in refusing to instruct as a matter of law, as follows:

It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so, there is no evidence upon which you may base any verdict as to the amount of damage sustained by plaintiff (Tr. p. 282).

(f) To the ruling of the court in refusing to instruct as a matter of law, as follows:

You are not to guess at the amount of such costs nor to enter into the realm of speculation, for the burden of proving such costs is upon plaintiff and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff's expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant, because the plaintiff, in that event has not established by a preponderance of the evidence, the facts which are essential to a verdict in its favor (Tr. p. 282).

(g) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In a case of this kind, there are two distinct items as the ground of damages: *First.* What has already been expended towards performance, less the value of the materials on hand purchased for this particular work. *Second.* The profits that plaintiff would have realized by the performance of the whole contract.

The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore incapable of that

clear and direct proof which the law requires (Tr. p. 283).

(h) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract, then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of the evidence what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release, from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in the circumstances your verdict must be for the defendant (Tr. p. 283).

(i) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If there is omitted from the evidence elements of expense which plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved by not devoting all the time that would have been required in the performance of the contract and released from the risk of performance then your verdict should be for the defendant (Tr. p. 284).

(j) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In determining plaintiff's costs in performing said alleged contract allowance must be made for every item of cost and expense attending a full compliance with any performance of said alleged contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural (Tr. p. 284).

(k) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract, its expense ceased; its plant became free to be used in other ventures and was no longer employed in this, and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon, as to the possible profits plaintiff would have earned or damages it would have sustained (Tr. pp. 284-285).

(l) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless

the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did not procure other work to take the place of the work mentioned in said contract, during the time it would be employed in the performance of this contract you should deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case (Tr. p. 285).

(m) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the plaintiff was not damaged by the alleged breach of contract or if so damaged the amount of those damages, but it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages (Tr. pp. 285-286).

(n) To the ruling of the court in refusing to instruct as a matter of law, as follows:

If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant (Tr. p. 286).

(o) To the ruling of the court in refusing to instruct as a matter of law, as follows:

In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and the amount of such profits, your verdict must be for the defendant (Tr. p. 286).

(p) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind.

You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.

If, after a careful consideration of all the evidence you are not able to conclude from the facts

which are established that there was a contract, or if you conclude that there was a contract, but that the damages claimed are too speculative or remote, your verdict should be for the defendant, because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor (Tr. p. 287).

(q) To the ruling of the court in refusing to instruct as a matter of law, as follows:

The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales, and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's, he cannot recover. In other words, if the testimony is evenly balanced it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant you must find for the defendant; that is the law. The plaintiff can only recover where

his testimony outweighs that of the defendant (Tr. p. 288).

(r) To the instruction of the court given as follows:

This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication of structural steel. With the nature and terms of that contract you have been familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on (Tr. pp. 288-289).

(s) To the instruction of the court given as follows:

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by defendant are both denied in the answer, the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it had been completed by the architect, but it does appear without controversy that those specifications were so far com-

pleted as that both parties treated the contract as ready for execution to the extent that the specifications and drawings had been furnished and that plaintiff, at the direction and request of defendant, had entered upon its execution so that for all purposes affecting the rights of the parties herein involved the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant, the action of the defendant, as disclosed by the correspondence between the parties and which is wholly uncontroverted directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituted in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon (Tr. pp. 289-290).

(t) To the instruction of the court given as follows:

The rule or measure of damages which may be recovered for the breach of a contract such as this, is the difference between the consideration stipulated to be paid under the contract for its performance and the cost of such performance. That is to say under the contract in suit, the damages plaintiff will be entitled to at your hands, is the difference between the agreed price per ton for the quantity of structural steel which you may

find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; and, in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board the cars in San Francisco in a fabricated state, with interest and so forth. That interest, I would suggest to you, will be at the legal rate of seven per cent under the law of this state (Tr. pp. 290-291).

(u) To the instruction of the court given as follows:

The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence; that is, by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against a less number,

or other evidence satisfying your minds. The direct evidence of one witness who was entitled to full faith and credit is sufficient to prove any fact in a case such as this (Tr. p. 291).

(v) To the instruction of the court as follows:

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty first, that what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and secondly, the probable gross quantity of steel, in tons, it would have required to complete the building; thereupon by taking the total cost to plaintiff of fabricating and delivering the material and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, $77.00, the difference or result will be the profit which plaintiff would have made on the contract and which would represent the damages which, under the law, it would be entitled to recover (Tr. pp. 291-292).

(w) To the instruction of the court as follows:

In figuring the cost to plaintiff of fabricating the steel in question the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this

particular work, should not be taken into account unless you find that such item of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract, but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant (Tr. p. 292).

(x) To the instruction of the court as follows:

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand as stated, that reasonable certainty in the respect mentioned is all that is required. Plaintiff is not called upon to prove his case to a demonstration. The evidence is all before you and it is for your consideration alone. It is the duty of the court to state the law and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the court to interfere.

You must be certain, however, that your verdict is based upon the evidence, and is not the result of arbitrary desire on the one hand or of surmise or speculation on the other (Tr. p. 293).

Question 3 above is raised on exceptions:

(a) To the ruling of the court admitting in evidence plaintiff's Exhibit "K" and plaintiff's Exhibit No. 3 (Tr. p. 99).

(b) To the ruling of the court denying the motion for non-suit made by defendant (plaintiff in error) (Tr. pp. 231-232).

Question 4 above is raised on exceptions:

(a) To the ruling of the court denying the motion for non-suit made by counsel for defendant (plaintiff in error) (Tr. pp. 231-232).

II.

Assignment of Errors.

Many errors are assigned in connection with the four main questions presented above, and arise principally upon the admissibility of evidence and upon the giving or the refusing of instructions. All of these latter questions, however, are subsidiary to the four questions enunciated and at most lend color to the propositions therein involved. Independent of their connection with the points made in the admissibility of the evidence, or the instructions the four main questions can be discussed

on the record. The other errors will be discussed only in connection with or incidental to the main questions. A consideration of such errors may give a clearer understanding to the contentions of plaintiff in error.

They are therefore all included in the following assignment of errors upon which the plaintiff in error will rely herein, and which it intends to urge in the prosecution of this writ of error.

ASSIGNMENT No. 11.

The court erred in refusing to give the following instruction requested by the defendant:

> "I instruct you that inasmuch as it appears from the evidence that the drawings were a material part of the contract and were never completed, that the contract is void and therefore your verdict must be for the defendant."

the same being contained in the transcript of record on pages 280 to 281 and said refusal constituting Exception No. 11.

ASSIGNMENT No. 12.

The court erred in refusing to give the following instruction requested by the defendant:

> "In its third amended complaint on file plaintiff alleges that on the 19th day of January, 1907, a contract was made with the defendant whereby plaintiff agreed to deliver to defendant F. O. B. cars San Francisco, California, at $77 per ton the quantity of structural steel and iron required by plans and specifications for the Columbia Theatre Building recited in said alleged contract, which quantity

plaintiff estimates at approximately 1500 tons and plaintiff says that by the terms of the contract plaintiff agreed to deliver all such material to the defendant before September first, 1907."

"I instruct you that unless plaintiff has established to your satisfaction by a preponderance of evidence, the existence of a contract containing all those substantial terms, to wit: the plans and specifications, the character of the work to be done, the price, the quantity to be delivered and the time of delivery, and in addition to that, established by the same preponderance of evidence that plaintiff's cost in carrying out the contract was less than the contract price, your verdict must be for the defendant."

the same being contained in the transcript of record on page 281 and said refusal constituting Exception No. 12.

ASSIGNMENT No. 13.

The court erred in refusing to give the following instruction requested by the defendant:

"It is the duty of the plaintiff to establish by a preponderance of the evidence the complete cost to plaintiff of the performance of this contract. Unless it has done so there is no evidence upon which you may base any verdict as to the amount of damages sustained by plaintiff."

the same being contained in the transcript of record on page 282 and said refusal constituting Exception No. 13.

ASSIGNMENT No. 14.

The court erred in refusing to give the following instruction requested by the defendant:

> "You are not to guess at the amount of such costs, nor to enter the realm of speculation, for the burden of proving such costs is upon plaintiff, and if you are unable to find from the evidence the cost of performing the alleged contract and every item of plaintiff's expenses in such performance, or if you are unable to conclude from the facts which are established to your satisfaction by a preponderance of the evidence what would have been the cost to plaintiff in the performance of said alleged contract, then your verdict should be for the defendant because the plaintiff in that event has not established by a preponderance of the evidence the facts which are essential to a verdict in its favor."

the same being contained in the transcript of record on page 282 and said refusal constituting Exception No. 14.

ASSIGNMENT No. 15.

The court erred in refusing to give the following instruction requested by the defendant:

> "In a case of this kind there are two distinct items as the ground of damages. *First:* What has already been expended towards performance, less the value of the materials on hand, purchased for this particular work. *Second:* The profits that plaintiff would have realized by the performance of the whole contract.
>
> "The second item, profits, cannot always be recovered. They may be too remote and speculative in their character and therefore in-

capable of that clear and direct proof which the law requires."

the same being contained in the transcript of record on page 283 and said refusal constituting Exception No. 15.

Assignment No. 16.

The court erred in refusing to give the following instruction requested by the defendant:

"If it is possible for you to satisfy yourself by a preponderance of the evidence of the cost to plaintiff of the performance of this contract then before you may render a verdict as to the amount of damages it sustained, if any, you must determine from a preponderance of evidence what deduction should be made from the contract price for the time saved by plaintiff in the performance of the contract, its release from care, trouble, risk and responsibility attending a full execution of the contract; unless you are able to determine from the evidence what amount plaintiff saved in these circumstances your verdict must be for the defendant."

the same being contained in the transcript of record on page 283 and said refusal constituting Exception No. 16.

Assignment No. 17.

The court erred in refusing to give the following instruction requested by the defendant:

"If there is omitted from the evidence, elements of expense which the plaintiff would have incurred had the contract been performed, or elements showing the amount plaintiff saved

> by not devoting all the time that would have been required in the performance of the contract and release from the risk of performance, then your verdict should be for the defendant."

the same being contained in the transcript of record on page 284 and said refusal constituting Exception No. 17.

ASSIGNMENT No. 18.

The court erred in refusing to give the following instruction requested by the defendant:

> "In determining plaintiff's cost in performing said alleged contract allowance must be made for every item of cost and expense attending a full compliance with, any performance of, said alleged contract, and in estimating any profits which plaintiff claims it would have made in performing said contract you must, of course, exclude all such as are merely speculative and conjectural."

the same being contained in the transcript of record on page 284, and said refusal constituting Exception No. 18.

ASSIGNMENT No. 19.

The court erred in refusing to give the following instruction requested by the defendant:

> "If you find that a contract has been established with all its essential terms, then when plaintiff ceased to perform the contract its expense ceased; its plant became free to be used in other ventures and was no longer employed in this, and if it is impossible to ascertain from the evidence what plaintiff saved on the general cost of completing the alleged contract by

not being required to perform it, then the evidence is insufficient and too speculative for you to base any just and legal verdict thereon, as to the possible profits plaintiff would have earned or damages it would have sustained."

the same being contained in the transcript of record at pages 284-5 and said refusal constituting Exception No. 19.

ASSIGNMENT No. 20.

The court erred in refusing to give the following instruction requested by the defendant:

"If you should find by a preponderance of the evidence that there was a contract between the plaintiff and the defendant it was nevertheless the duty of the plaintiff not to allow its plant to remain idle, but to use every reasonable effort to procure other work, and if it did not procure other work to take the place of the work mentioned in said contract during the time it would be employed in the performance of this contract, you should deduct the amount of profits made by the plaintiff on such other work from any sum you may find it is entitled to under the facts of this case."

the same being contained in the transcript of record on page 285 and said refusal constituting Exception No. 20.

ASSIGNMENT No. 21.

The court erred in refusing to give the following instruction requested by the defendant:

"The burden of proof in this case is upon the plaintiff. It does not devolve upon the defendant to show that the plaintiff was not

> damaged by the alleged breach of contract, or if so damaged the amount of those damages. But it devolves upon the plaintiff in order to prevail to establish by a preponderance of the evidence that the alleged breach of contract in fact damaged plaintiff and the amount of such damages."

the same being contained in the transcript of record on pages 285-6 and said refusal constituting Exception No. 21.

Assignment No. 22.

The court erred in refusing to give the following instruction requested by the defendant:

> "If the evidence leaves you in doubt as to whether or not plaintiff was damaged by the breach of contract, or as to the amount of the damages, your verdict must be for the defendant."

the same being contained in the transcript of record on page 286 and said refusal constituting Exception No. 22.

Assignment No. 23.

The court erred in refusing to give the following instruction requested by the defendant:

> "In no instance are you to conjecture or surmise that plaintiff would have profited by the performance of the contract. If no facts are disclosed to you by a preponderance of the evidence which establish that the plaintiff would have profited by the performance of the contract and the amount of such profits your verdict must be for the defendant."

the same being contained in the transcript of record on page 286 and said refusal constituting Exception No. 23.

Assignment No. 24.

The court erred in refusing to give the following instruction requested by the defendant:

> "The direct evidence of one witness who is entitled to full credit is sufficient for proving any fact in this case. The evidence upon which your verdict should be based must be satisfactory evidence and that evidence only is satisfactory which produces moral certainty in an unprejudiced mind. You are not to guess at whether or not there was a contract, if any, nor guess at the amount of damages plaintiff sustained, if any, nor should you enter into the realm of speculation for the burden of proving such facts is upon the plaintiff. If you are unable to find from the evidence that there was a contract, or if you find there was a contract, but you are unable to find from the evidence the amount of damages plaintiff sustained, if any, your verdict must be for the defendant. If the evidence upon any of these questions is equally balanced your verdict must also be for the defendant.
>
> If, after a careful consideration of all the evidence you are not able to conclude from the facts which are established that there was a contract, or if you conclude that there was a contract but that the damages claimed are too speculative or remote your verdict should be for the defendant because in none of these instances has the plaintiff established by a preponderance of evidence the facts which are essential to a verdict in its favor."

the same being contained in the transcript of record on p. 287 and said refusal constituting Exception No. 24.

Assignment No. 25.

The court erred in refusing to give the following instruction requested by the defendant:

> "The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a preponderance of evidence as to the justice of his claim; what we mean by a preponderance of evidence is this: We cannot get a pair of scales and by some arbitrary method put on one side the testimony of plaintiff and on the other side the testimony of defendant and say which outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.
>
> The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that it outweighs the proof of the defendant's, he cannot recover. In other words, if the testimony is evenly balanced it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant, you must find for the defendant, that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant."

the same being contained in the transcript of record on page 288 and said refusal constituting Exception No. 25.

ASSIGNMENT NOS. 26, 27, 28, 29, 30, 31, 32 and 33.

The court erred in giving the following instruction:

"The COURT. Ordinarily I would not submit the case to you at this hour, but we are rather short of jurors on the panel and I may need your services in another case in the morning. It strikes me that this case is a very simple one, not only in its facts, but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night. My hesitation about submitting a case to a jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such results will follow in this case, so I will submit the case to you now. Give me your attention."

"This is an action brought by the plaintiff to recover from the defendant the damages alleged to have been suffered by it through the breach by defendant of a contract for the fabrication and delivery of structural steel. With the nature and terms of that contract you have been made familiar and I need not recite them. There is, under the evidence, substantially but one question left for your determination in reaching a verdict, and that is as to the amount of damages, if any, plaintiff has suffered through the breach of the contract sued on.

Counsel for the defendant in his argument concedes that the plaintiff is entitled to some damages, but the amount is in controversy. While the making of the contract and its breach by the defendant are both denied in the answer the evidence shows without any conflict whatsoever that the contract was duly executed between the parties as alleged. It is

true that it does not appear that the specifications or detail drawings for all the steel to be furnished under it have been completed by the architect, but it does appear without controversy that those specifications were so far completed as that both parties treated the contract as ready for execution to the extent the specifications and drawings had been furnished, and that plaintiff at the direction and request of defendant had entered upon its execution so that for all purposes affecting the rights of the parties here involved the contract is to be regarded as having been duly executed. As to the alleged breach of the contract by the defendant the action of the defendant as disclosed by the correspondence between the parties and which is wholly uncontroverted, directing the stopping of all work under the contract and stating that the contemplated structure had been abandoned, justified plaintiff in treating the contract as at an end, and constituting in law a breach of the contract by defendant. You would not be justified, therefore, under the evidence in finding against either the execution of the contract by the parties or its breach by the defendant as counted upon.

This leaves, as I have said, but one substantive question for your consideration, and that is the question of damages.

The rule or measure of damages which may be recovered for the breach of a contract such as this is the difference between the consideration stipulated to be paid under the contract for its performance and the cost of such performance. That is to say, under the contract in suit, the damages plaintiff will be entitled to at your hands is the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete

the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board the cars in San Francisco in a fabricate state, with interest and so forth. That interest I would suggest to you will be at the legal rate of seven per cent under the law of this state.

The question of the amount of damages plaintiff has suffered being in controversy, the burden is upon the plaintiff to establish the amount of such damages by satisfactory evidence, that is by evidence which produces moral certainty in your mind as unprejudiced persons, and when there is any conflict in the evidence it must preponderate in favor of the plaintiff, that is, the evidence should, in your judgment, be to some extent stronger in favor of plaintiff than that which is against it. Preponderance of evidence does not mean the greater number of witnesses, for you are not bound to decide in accordance with the testimony of any number of witnesses which does not produce conviction in your minds as against a less number or other evidence satisfying your mind. The direct evidence of one witness who is entitled to full faith and credit is sufficient to prove any fact in a case such as this.

The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as dis-

closed in the testimony; and, secondly, the probable gross quantity of steel in tons it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the building by the price per ton fixed in the contract, that is, $77, the difference or result will be the profit which plaintiff would have made on the contract and which would represent the damages, which, under the law, it would be entitled to recover.

In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments without regard to this particular work, should not be taken into account unless you find that such items of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract; but the jury should include in the item of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant.

The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results.

You will understand, as stated, that reasonable certainty in the respect mentioned, is all that is required; plaintiff is not called upon to prove his case to a demonstration; the evidence is all before you and it is for your consideration alone. It is the duty of the court to

state the law and by that the jury are bound, but the facts are to be found by the jury as to all questions about which there is any conflict or controversy; and with that function it is not the province of the court to interfere.

You must be certain, however, that your verdict is based upon the evidence and is not the result of arbitrary desire on the one hand or of surmise or speculation on the other.

The clerk has prepared forms of verdict for you, gentlemen of the jury, which you will make out in this case as indicated to you by my instructions. When you have reached a conclusion you will report to the court. As it has been suggested, the plaintiff will be entitled to some verdict at your hands, so the other form of verdict which the clerk has drawn up will not be required and all that it will be necessary for you gentlemen to do is to fill in the amount of damages which you may find in favor of the plaintiff. You will bear in mind that in the federal court the verdict of the jury must be unanimous, and cannot be by a less number as in the state courts. You may now retire, gentlemen of the jury."

the same being contained in the transcript of record on pages 288-294, and the giving thereof constituting Exceptions Nos. 26, 27, 28, 29, 30, 31, 32, 33.

Assignment No. 2.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of a certain proposition which purports to be a proposition by the Modern Steel Structural Company, dated Waukesha, Wisconsin, January 4, 1907, to the American-Pacific Construction Com-

pany, whereby the Modern Steel Structural Company agreed to furnish the structural steel and iron and reinforcing steel (except the grillage beams, bolts, separators and column bases mentioned on page 3 of specifications referred to in said proposal) for the Richelieu Syndicate Theatre and Office Building known as the Columbia Theatre, located southeast corner Van Ness Avenue and Geary Street, San Francisco, California, being plaintiff's Exhibit "K", and which was and is in exactly the following words and figures, to wit:

"Modern Steel Structural Co.
Waukesha, Wis., Jan. 4, 1907.
American-Pacific Construction Co.,
San Francisco, Cali.

We propose to furnish you in good order the following described structural material constructed in a workmanlike manner described as follows and in accordance with drawings furnished by Joseph D. Smedberg and specifications also furnished by J. D. Smedberg, identified with marks:

'Copy No. 1', initialed, 'S. B. H. 12/30/06', excepting as noted under 'REMARKS' on sheet No. 2 attached.

Namely the structural steel and iron and reinforced steel (except the grillage beams, bolts, separators and column bases mentioned on page 3, of specifications referred to above) for the Richelieu Realty Syndicate Theatre and Office Building, known as the Columbia Theatre; location, southeast corner of Van Ness and Geary Street, San Francisco, Cali.

Delivery as follows: *That portion indicated by Mr. Smedberg, shown within red lines on blue prints 3-S, 4-S, 7-S, dated by us on back of print as received Dec. 31, 1906, and 8-S, dated by us on back of print as received Jan.*

3, 1907, required to begin erection of steel work on stores to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg.

Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg.

Remarks. Our proposition is based on the substitution in part (as referring to *'Kind, Character and Finish of Materials'* beginning on page 9 and *'Inspection'* beginning page 11 of the above specifications) of Manufacturers' Standard Specifications as found in Carnegie's Hand Book.

Mill Test Reports, within said specifications are proposed as being satisfactory in the above respects to Mr. Smedberg, and upon his request stating upon which portions of the work he will require such reports, we will comply therewith by furnishing same.

We also agree that the tonnage is to be determined and paid for by certificates from the Western Weighing Association at the point of shipment. It is understood that the American-Pacific Construction Company, at their own expense, will weigh same at the public scales in San Francisco, and should they prove that the weights so certified by the Western Weighing Association at point of shipment are not correct, we hereby agree to reimburse the American Construction Company, the amount overpaid us.

Price to be Seventy-seven dollars ($77.00) per ton: Freight allowed to San Francisco, Cali. Correct figured weights of steel to govern amount of sale and all steel work to be accepted at our works by Mr. Smedberg, or his authorized agent.

Terms of payment as follows: 30 days net cash from date of invoices.

Payable in New York, Chicago or Milwaukee exchange, free of expense to us for the collection charges.

We are responsible for shop errors in work not erected by ourselves and for alterations, whether erected by ourselves or not, only when notified of same in writing before correction is made and given an opportunity and reasonable time to suggest remedy or to ourselves make alterations.

When delays are caused to our men by material or labor not furnished by us, you agree to pay their time, at our regular rates and their expenses, while so delayed.

This contract is contingent upon our ability to procure material from the mills, delays of carriers and upon strikes, accidents or other delays unavoidable or beyond our reasonable control.

It is expressly agreed that there are no promises, agreements of understandings outside of this contract and that no agent or salesman has any authority to obligate the Modern Steel Structural Company by any terms, stipulations or conditions not herein expressed.

The title and right of possession to all material we furnish remains with the Modern Steel Company until the same has been fully paid for in cash.

This proposition is for immediate acceptance, but although accepted does not constitute a contract until approved by an executive officer of the Modern Steel Structural Company, and is subject to change or withdrawal until so approved.

In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to

name an uninterested umpire (testimony of F. W. Harding), *whose decision shall be binding on all parties to the contract.*

Ship via:

MODERN STEEL STRUCTURAL CO.,
Accepted Jany. 17, 1907, by S. B. H.
Approved by S. B. Harding, Pres.
AMERICAN-PACIFIC CONSTRUCTION CO.,
Thomas Vigus,
General Manager."

and admitting the same in evidence as shown in the transcript of record on pages 99 and 190-196, and said ruling constituting Exception No. 2.

ASSIGNMENT No. 3.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Samuel B. Harding:

> " 'Does it indicate the acceptance of the contract?' To which question witness replied, 'It indicates that I, on receipt of that letter and enclosure, gave the job a number, and contract as it were, through which it would be known in our plant by number. That is the custom whenever we receive an accepted contract, to at once give it a number.' "

and admitting the same in evidence as shown in the transcript of record on page 276, and said ruling constituting Exception No. 3.

ASSIGNMENT No. 4.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said

cause of certain specifications made by Frank T. Shay, Architect, San Francisco, and Joseph D. Smedberg, Consulting Engineer, San Francisco, which purported to be specifications for the structural steel and iron of an eight-story office building and theatre to be erected on the southeast corner of Van Ness Avenue and Geary Street, for the Richelieu Syndicate, San Francisco, Cal., being plaintiff's Exhibit "M", and admitting the same in evidence as shown in the transcript of record on page 276, and said ruling constituting Exception No. 4.

Assignment No. 5.

The court erred in overruling the objection of counsel for the defendant (plaintiff in error) to the introduction in evidence at the trial of said cause of certain detail drawings consisting of 31 sheets on tracing cloth, made by the Modern Steel Structural Company, which purported to be detail drawings for a part of the structural steel work for said Columbia Theatre Building, being plaintiff's Exhibits "A", "B", etc., and annexed to defendant's bill of exceptions, and marked Exhibit "A" and admitting the same in evidence, as shown in the transcript of record on pages 276-277, and said ruling constituting Exception No. 5.

Assignment No. 6.

The court erred in overruling the objection of counsel for said defendant (plaintiff in error) to

the following question asked by counsel for plaintiff of the witness, Samuel B. Harding:

> " 'Now, Mr. Harding, I will ask you if at all times during the months of March, April, May and June, 1907, the plaintiff stood ready and willing to carry out the contract with the defendant?' to which question the witness replied, 'It did.' "

and admitting the same in evidence as shown in the transcript of record on page 277, and said ruling constituting Exception No. 6.

Assignment No. 7.

The court erred in refusing to grant the motion of counsel for said defendant (plaintiff in error) to strike out the following portion of the answer of the witness Samuel B. Harding:

> " 'And my reasons for that statement would be this: The American-Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it; now the architect's plans—I am speaking now of the original plans from which we made our detail drawings—were incomplete at the time we began work and Mr. Smedberg came up for the purpose of completing these drawings, and insofar as we went in examining the original drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked Exhibit "O", calling attention to the discrepancies, and I therefore, from such investigations and discrepancies found, think that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per

> cent or 25 per cent. Of course this would not apply to all the structure.' The question propounded to the witness was: 'But 1500 tons at least according to these specifications?' To this question the witness answered 'Yes,' and proceeded as stated before."

and admitting the same in evidence as shown in the transcript of record on pages 277-278, and said refusal constituting Exception No. 7.

Assignment No. 8.

The court erred in overruling the objection of counsel for said defendant (plaintiff in error) to the following question asked by counsel for plaintiff of the witness, Frederick Hoffman:

> "'From your examination of the drawings and specifications of the buildings, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?' to which question the witness replied: 'In my judgment it would take in the neighborhood of 1500 tons.'"

and admitting the same in evidence as shown in the transcript of record on page 278, and said ruling constituting Exception No. 8.

Assignment No. 9.

The court erred in sustaining the objection of counsel for plaintiff to the following question asked by counsel for defendant (plaintiff in error) of the witness, Thomas Vigus:

> "'With whom did you have that conversation'? It was admitted that the conversation

sought to be elicited was had with S. B. Harding, the president of the plaintiff company,"

and excluding the same from evidence as shown in the transcript of record on pages 278-279, and said exclusion constituting Exception No. 9.

ASSIGNMENT No. 10.

The court erred in denying the motion of counsel for defendant (plaintiff in error) for a judgment of non-suit and dismissal. Said motion being made on the following grounds:

"1. That there is a failure of proof in the following particulars:

a. It is not shown by the evidence that there has been a complete contract; on the contrary, the evidence shows that the contract is incomplete and imperfect in this:

That the proposal which is set forth in the evidence here and dated the 4th day of January, 1907, states that the defendant was to furnish certain structural steel in accordance with drawings and specifications to be furnished by Joseph Smedberg, which were identified with certain marks. It affirmatively appears from the evidence that those drawings have never been made or furnished.

2. There is a variance in this: The contract alleged required the plaintiff to deliver to defendant at San Francisco the fabricated steel on or before the 1st day of September, 1907, while the contract placed in evidence by plaintiff required delivery to be made within sixty or ninety days after completion of the detailed drawings.

3. There is a variance in this: The contract alleged states that there was an agreed tonnage of 1500 tons of steel to be furnished, while the

contract placed in evidence shows there was no agreed tonnage.

4. The action is premature inasmuch as the contract offered in evidence provides: 'In case any difference of opinion shall arise between the parties to this contract in relation to the contract, the work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract, and these two shall have the power to name an uninterested umpire whose decision shall be binding on all parties to the contract.' From the evidence it appears that there was no arbitration, and therefore the action is premature.

5. There is no evidence of damages. The attempt to show loss of profits or damages failed. There is absolutely no evidence of the costs, hence there is no way of determining any damages, except by guesswork."

as shown in the transcript of record on pages 279-280 and said denial constituting Exception No. 10.

To the discussion of the questions involved in the case as reflected by the propositions advanced in the rulings and instructions which constitute the foregoing assignment of errors we shall now proceed.

III.

Argument.

I.

THE PROPOSAL OF THE DEFENDANT IN ERROR AND ITS ACCEPTANCE BY THE PLAINTIFF IN ERROR DID NOT CONSTITUTE A VALID OR ANY CONTRACT (Exhibits "K" and No. 3, p. 99) BECAUSE:

(a) It was incomplete because although it contemplated furnishing all the structural steel re-

quired for a building to be constructed in accordance with the drawings and specifications to be furnished by Joseph D. Smedberg, such drawings were never made and the specifications were never completed and therefore there was no means of knowing or determining the character and quantity of steel to be furnished.

(b) Neither drawings nor specifications were ever attached to nor made a part of, said proposal: and neither the drawings nor specifications were ever completed. The partially completed specifications referred to drawings for the description of character and quantity of material, but such drawings were never completed. Therefore, it was impossible for either party to know the quantity of steel to be fabricated; the manner in which it was to be fabricated; or the size, form, weight or appearance of the various steel members entering into said building or the cost of fabricating the same. The said alleged contract is uncertain and indefinite inasmuch as it does not indicate in any manner, the amount of steel to be fabricated, or the size (long, short, broad or narrow) weight (light or heavy) form, appearance or style into which the various steel members of the proposed building were to be fabricated. Hence, the defendant in error never could fabricate the steel required for the building, the drawings and designs for which were never furnished; until they were finished even the architect of the proposed building could not describe any of its members, even though in his mind he had

formed some conception of its exterior design. No architect, engineer or other person could estimate the quantity without the drawings, as without them there would be no basis for such estimate.

Even a casual reading of said Exhibit "K" shows it to be a mere indefinite proposal. It is designated a proposal. It was submitted by the defendant in error and under familiar legal principles must be construed against it and in favor of the plaintiff in error.

There can be no contract, so called, enforceable at law unless its terms are certain, and the minds of the parties to the contract have met and agreed on its terms. This is horn-book law. It is so elementary and the authorities bearing thereon so numerous and relate to cases of such varying circumstances that only a few, illustrative of these principles, are cited:

Sec. 1598 of the Civil Code of the State of California provides: "Where a contract has but a single object, and such object is unlawful, whether in whole or in part, or wholly impossible of performance, *or so vaguely expressed as to be wholly unascertainable, the entire contract is void.*"

In *Nave v. McGrane* (decided by the Supreme Court Idaho in 1910), 113 Pac. 82, the action was one to recover the alleged contract price for certain building plans and specifications, prepared by plaintiff as an architect, for the defendant. It appeared that plaintiff undertook to furnish complete plans

and specifications to do whatever was necessary, according to the use and custom of architects and builders, to enable defendant to receive bids and let a contract and to accept as compensation therefor a percentage of the lowest responsible bid.

In the opinion, after reviewing a number of authorities as to the nature of plans and specifications, it is said (113 Pac. 85):

> "If the plans and specifications were not definite and certain as to the kinds and qualities of material to be used, the class of workmanship, etc., the time within which the building must be completed, the method of making payments and other matters, *the bid to construct the building would only indicate a willingness to negotiate further in regard to the matters not specified, and an acceptance would express a like willingness, but would not bind either party. If they did not subsequently agree upon a contract, each would be without remedy against the other.*
>
> "In *Gill Mfg. Co. v. Hurd* (C. C.), 18 Fed. 673, the court held that in order to constitute a contract the minds of the parties must meet and agree upon the terms of it. *If any part remains to be settled, the agreement is incomplete.*
>
> In *Shepard v. Carpenter,* 54 Minn. 153, 55 N. W. 906, the court held that an agreement to enter into a contract in the future, in order to be enforceable, must express all the material and essential terms of such future contract, *and not leave any of them to be agreed on in the future.*"

In *Price v. Stipek,* 104 Pac. 195, the complaint alleged that defendant gave an order for certain

goods by virtue of his having signed a memorandum of sale attached to the complaint as "Exhibit A". Said exhibit contained a list of a large number of articles of jewelry of various kinds, qualities and prices, and concluded with a request to ship "the goods listed in this order upon the terms named therein and no others, all of which I fully understand and approve."

In the opinion, after stating the facts, the Supreme Court of Montana said:

> "It is an elementary rule of the law that, to constitute a contract, *the subject-matter of the agreement must be expressed by the parties with a reasonable degree of certainty.* 7 Am. & Eng. Enc. Law (2d ed.) 116. In Thomson v. Gortner, 73 Md. 474, 21 Atl. 371, the court said: 'The law is too well settled to admit of doubt that, in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms *that it can be ascertained to a reasonable degree of certainty what they mean. And, if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties it is void, for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law.* It is hardly necessary to cite any of the numerous authorities that sustain this plain legal proposition.' *Doubtless this Exhibit A, when signed by the defendant, was intended to be an offer which upon acceptance by the plaintiffs would constitute a contract, and such result would have followed if the defendant had indicated what it was he proposed to purchase.* Upon the subject of offer and acceptance Page in his work on contracts says: 'The offer must not merely be complete

in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not. If no breach of the contract could be assigned which could be measured by any test of damages from the contract, it has been said to be too indefinite to be enforceable.' Page on Contracts, Sec. 28. And Parsons on Contracts, speaking of agreements for the sale of personal property, announces the same rule in the following language: The price to be paid must be certain, or so referred to a definite standard that it may be made certain. * * * And the thing sold must be specific, and capable of certain identification.' 1 Parsons on Contracts (9th ed.) p. 524.

"With these elementary principles before us, we search this instrument in vain for an answer to any of the following inquiries: *How many articles of any particular kind or class are ordered? What is the particular quality of the articles intended to be purchased, and what prices are to be paid for the several articles?* Did the defendant intend to order some articles of every description listed by plaintiffs in this Exhibit A, or did he intend to order only a portion of them? Did he intend to order belt buckles worth 15 cents each, or belt buckles worth $2 each? This exhibit does not itself answer any of these inquiries, and neither does it refer to any other source from which the information can be obtained. The instrument is clearly of that character which in Section 4999 Rev. Codes [the same as Sec. 1598 of the California Civil Code] is declared to be void in the following language: 'Where a contract has but a single object, and such object is * * * so vaguely expressed as to be wholly unascertainable, the entire contract is void.'

"Because this instrument is so indefinite and uncertain in its terms that the intention of the

> parties cannot be ascertained, we hold that it is not a contract, enforceable at law, and that the complaint, based upon the alleged breach of it, does not state facts sufficient to constitute a cause of action."

In *Levy v. Mantz*, 16 Cal. App. 666, 670, it is held that the due execution of a contract requires the assent of at least two minds to each and all of the essentials of the agreement; and it is only upon evidence of such assent that the law enforces the terms of the contract.

In *Grafton v. Cummings,* 99 U. S. 106, the court said:

> "In an agreement of sale * * * there must be a *sufficient description of the thing sold* and of *the price to be paid for it. It is,* therefore, an essential element of the contract, that it shall contain within itself a description of the thing sold by which it must be known or identified."

In *Almini Company v. King,* 92 Ill. App. 276, defendant in error sued to recover damages for the failure of plaintiff in error to comply with the terms of an alleged contract in writing by which it is said to have agreed to do the painting and glazing upon a house in process of construction. The contract referred to plans and specifications as "herein made a part" of it.

In holding the contract unenforceable, the court said:

> "They are not, however, attached to the instrument, nor is there anything in the contract to locate or identify them in any way. The contract, therefore, as offered, and upon which de-

fendant in error bases his claim to recover, is incomplete. The original specifications, as prepared, were introduced, but there is no evidence that they were ever seen by the Almini Company, or its agents, either before or at the time the contract was signed, or that they ever were in any way attached to or made a part of or identified in the contract, and there is no evidence to the contrary. The incomplete contract was not admissible in evidence and the objection thereto should have been sustained."

Also:

Wait Eng. & Arch. Juris., Secs. 214-695;
Worden v. Hammond, 37 Cal. 61;
Willamette etc. Co. v. College Co., 94 Cal. 229;
Donnelly v. Adams, 115 Cal. 129;
Moir v. Brown, 14 Barb. 39, 50;
Kercheis v. Schloss, 49 How. Pr. 284-286;
Adams v. Hill, 16 Me. 215.

No case can be cited in which a contract as incomplete or as uncertain as the alleged contract in the case at bar was ever sustained.

Remembering the principles announced above, we quote from the proposal:

"Proposal from the Modern Steel Structural Company", dated "Waukesha, Wis. Jan. 4, 1906". "We propose to furnish you in good order the following described structural material, constructed in a workmanlike manner *described as follows and in accordance with* DRAWINGS FURNISHED BY JOS. D. SMEDBERG *and* SPECIFICATIONS ALSO FURNISHED BY JOS. D. SMEDBERG, IDENTIFIED WITH MARKS: "Copy

#1, initialed, 'S. B. H. 12/30.06'," excepting as noted under marks on sheet #2 attached, namely, the structural steel and iron, etc."

The proposal in providing for the time of delivery, states that certain of the structural material was,

> *"to be shipped from our shop 30 days from our receipt of approved working detail drawings, signed by Mr. Smedberg. Balance of steel shipments to be 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg."*

As it will be seen from the specifications (Tr. p. 107) they do not contain any description of the structural material in question, but refer to the drawings. *The specifications admitted in evidence were not* attached to the alleged *"contract"* nor were they complete in themselves nor did they contain the identifying marks. How could they be complete, when they did not pretend to cover the theatre portion of the proposed building?

It must be conceded by the defendant in error—the uncontradicted evidence forces the concession:

1. *That the drawings referred to in the said proposal were never completed nor furnished nor signed by Joseph D. Smedberg,* the engineer employed by the Richelieu Realty Syndicate and by its architect.

(Specifications Tr. pp. 107, 108, 110, and 111 to 124.)

(Test. S. B. Harding, Tr. pp. 104, 131, 165.)

(Test. F. W. Harding, Tr. pp. 201, 255.)

(a) Even the drawing for the upper part of the office portion of the building was not completed when the proposal was accepted.

Testimony S. B. Harding (Tr. p. 104).

(b) The papers or drawings, so called, in evidence, are mere detailed drawings prepared by the defendant in error for a small part of the office part of the building and mostly cover the thirty-nine and one-fourth tons of steel shipped to plaintiff in error (Tr. bottom pp. 201, 202).

These papers or drawings are not architectural plans. They are what are known as steel drawings, some of them being shop details, and there is nothing among them from which one could make an estimate of the total steel for the building (Tr. pp. 247-248).

All the drawings and material sheets in evidence taken together, only cover or represent 256 to 262 tons of steel (Tr. 237; also p. 241).

(c) There is no paper or drawing or anything else in the record from which any engineer could determine how many tons of steel would be required to complete the proposed or projected building. *This is not denied.*

Testimony William Breite, Tr. p. 234, p. 235;
Testimony Peter Zucco, Tr. p. 241;
Testimony John D. Galloway, Tr. pp. 247, 248.

2. *The drawings for the theatre portion of the building were never completed.*

See,—

The specifications of building offered in evidence by defendant in error (plaintiff below) over the objections of plaintiff in error, contain the following:

> *"The general plans for the Theatre portion of the building being incomplete still, the intention is to erect the Office Building portion first and especially rush work on the first section columns, first and second story beams and sidewalk beams. Open holes in columns, beams and girders for conencting Theatre Cantilevers, etc., will be drilled in the field as arrangements of theatre framing cannot be determined accurately at present, and this method will not delay any portion of the office building construction due to lack of information regarding connection"* (Tr. p. 108).

F. W. Harding, vice president of defendant in error, testified that the drawings as far as the theatre was concerned were never prepared (Tr. p. 255; also p. 201).

S. B. Harding, president of the defendant in error, speaking of the drawings for the building, testified they were only completed in part (Tr. p. 131; also p. 165).

3. *The "theatre" was intended to constitute more than one-half of the proposed combined office and theatre building.*

F. W. Harding, vice-president of the defendant in error, testified that the theatre would constitute from *forty to fifty per cent of the entire building* (Tr. p. 254, p. 255).

C. H. Snyder, contracting engineer with Milliken Brothers, manufacturers of structural steel, testified that the theatre would constitute more than one-half the ground floor, and up to the sixth story of an eight story building (Tr. pp. 245-246).

John D. Galloway, structural engineer, testified that the theatre would constitute seventy-five per cent of the proposed combined building (Tr. p. 249).

Also see Specifications (Tr. p. 108).

It is not even claimed by defendant in error that the architectural design or the general plan or any of the drawings for the theatre were ever made. And it must be admitted, because there is no testimony to the contrary, that the theatre would constitute more than one-half of the proposed combined office and theatre building.

The essential elements of the alleged contract in question are the quantity of steel to be furnished and the price to be paid on the performance of the contract. The "proposal" required the payment of seventy-seven (77) dollars per ton for every ton of steel delivered and required defendant in error to furnish all the steel *required by the drawings and specifications to be thereafter completed.* As to the price the proposal required the payment of $77 per ton for every ton of steel delivered; and the quantity of steel to be delivered depended on *drawings to be prepared* and which were never prepared. These drawings and

specifications were never completed in *most material parts.* They were not even *completed for the office part of the building* and none of them bearing on the theatre part *was even started.* Therefore we have this condition: plaintiff in error was required to pay $77 per ton for an amount of steel *to be determined in the future,* which amount defendant in error was required to furnish, and this amount was never determined.

This omission is fatal to the validity of the contract. It is *inchoate, incomplete* and *uncertain.*

Civil Code of California, Sec. 1598;
Nave v. McGrane, 113 Pac. 82;
Price v. Stipek, 104 Pac. 196;
Levy v. Mantz, 16 Cal. App. 666-670;
Grafton v. Cummings, 99 U. S. 106;
Gill Mfg. Co. v. Hurd, 18 Fed. 673;
Almini Co. v. King, 92 Ill. App. 276.

B.

NEITHER DRAWINGS NOR SPECIFICATIONS WERE ATTACHED TO NOR MADE A PART OF SAID PROPOSAL; AND NEITHER THE DRAWINGS NOR SPECIFICATIONS WERE IDENTIFIED BY THE MARKS SPECIFIED IN THE PROPOSAL OR ALLEGED CONTRACT, NOR WERE EVER COMPLETED. THEREFORE THE CONTRACT WAS INCOMPLETE AND VOID.

"Very often many of the important stipulations and conditions of a contract are incorporated into the specifications as general conditions applicable to almost any work and they should be made a part of the contract with certainty. The plans showing the extent and size of the work undertaken, and specifications

describing it and the materials to be used, and the direction as to the performance of the contract are a necessary and important part of the contract. They are as binding as are the terms and covenants of the contract."

Wait, Engineering and Architectural Jurisprudence, Sec. 214.

"The amount of work to be performed, which may be taken as the basis of such an estimate of the cost are the quantities given in the specifications or shown on the plans and described in the contract, and it is submitted that the advertisement and proposal might be utilized, if the contract, specifications and plans did not furnish an estimate of its magnitude but not it seems estimates by the company's engineers made after the contract was entered into."

Wait Engineering and Architectural Jurisprudence, 634, Sec. 695.

In *Worden v. Hammond,* 37 Cal. 61 at page 64, the court said:

"The specifications are an essential part of the contract, and are as material as the price of the work or the terms of payment; for the contract price was not to be paid until the barn was completed according to the specifications. It is not indispensable that the specifications be signed by the party to be charged, but it will be sufficient if they are referred to with certainty. *But where the reference is false, it cannot be helped out by oral evidence. Here the specifications were referred to as annexed to the contract, and when the plaintiffs were permitted to introduce in evidence, as the specifications referred to, a paper which*

they admitted was never attached to the contract, if they did not thereby contradict the written contract, they added to its terms by oral evidence."

In *Willamette etc. Co. v. College Co.,* 94 Cal. 229, at page 233, the court said:

> "The insertion of this clause in the contract made the drawings and specifications an essential part thereof, as material as was the price of the work or the terms of payment; and until they were 'annexed' to the contract so that its entire terms could be ascertained by mere inspection, and without oral testimony, the contract was only inchoate and not complete, and could not form the basis of a recovery."

The two cases from which the foregoing quotations are taken are approved in *Donnelly v. Adams,* 115 Cal. 129, 131:

> "The only distinction between the contract in the case at bar and those considered in the cases cited lies in the fact that in the present instance the reference is to specifications *signed* in the other it was to specifications *attached.* But the one reference is no less significant and essential than the other. If the specifications be not signed, or if they be not attached, in either case there is a false reference in a written contract which cannot be aided by parol evidence. In both cases the contract is left 'inchoate and not complete, and could not form the basis of a recovery'."

To the same effect see

Gilmore v. Lycoming Fire Ins. Co., 55 Cal. 123.

This same principle is applied in cases where an assignment is made for the benefit of creditors and reference is made to schedule attached, etc. Of course, it is held in these cases that in the absence of the schedule, the contract is rendered so indefinite and uncertain as to be unenforceable.

Moir v. Brown, 14 Barb. 39, 50;
Merchers v. Schloss, 49 How. Pa. 286.

The principle underlying all these cases sustains without question the contention that while some of the terms and conditions of a contract need not appear in the contract itself, but may be referred to as being contained in an attached document, still where such a reference is made to a document *as being attached* or *as being "signed"* or *otherwise "identified"* by marks or otherwise, and it is not *"attached"* or so *"signed"* or so *"identified" by marks or otherwise.* The contract is void.

In this case the drawings, from which could be determined the essential element of quantity, were omitted.

The "alleged contract", received in evidence over our objection, refers to drawings and specifications "identified with marks: Copy No. 1, Initialed S. B. H. 12/30/06" (Tr. p. 99).

The specifications received in evidence do not bear these identifying marks (Tr. pp. 106-124). Hence our objection (Tr. p. 105).

The initials "S. B. H." are the initials of Samuel B. Harding, the president of the Modern Steel

Structural Company, defendant in error. The contract was to be performed in accordance with specifications so identified, and in accordance with no other specifications. The specifications received in evidence are not so identified. *Therefore the reference in the contract to the specifications is false, and cannot be helped out by oral evidence.*

Donnelly v. Adams, supra;
Willamette Co. v. College Co., supra;
Worden v. Hammond, supra.

As the reference is false and cannot be aided by parol evidence, the alleged contract is left "inchoate and not complete, and could not form the basis of a recovery." (*Donnelly v. Adams,* supra.)

Obviously the rule announced is correct. Without completed drawings and identified specifications no one could determine the size, weight, or appearance of the various steel members which would enter into the finished building. Without a completed design no one could surmise what the general appearance or shape even of the exterior of the theatre would be.

As was said in *Nave v. McGrane,* 113 Pac. 82, at page 85:

> "If the plans and specifications were not definite and certain as to the kind and qualities of material to be used, the class of workmanship, etc., the time within which the building must be completed, the method of making payments and other matters, the bid to construct the building would only indicate a willingness to negotiate further in regard to the matters

not specified, and its acceptance would express a like willingness, but would not bind either party if they did not subsequently agree upon a contract, each would be without remedy against the other."

In the case at bar both the specifications and drawings being incomplete and unidentified it was open to the owner and the contractor practically to plan their own building, or by failing to agree on drawings and specifications to avoid the contract.

It is a matter of daily observation that buildings of the same dimension may vary considerably in the amount of steel required for their constituent members. Some eight story buildings are often constructed with columns, beams and girders of sufficient strength and weight to carry additional stories; while others are constructed with columns, beams and girders as light and thin as the nature of the structure will permit. It is also a matter of common knowledge that one architect will design a building with massive pillars and numerous steel ornaments of great weight, while another will boast of the simplicity, lightness and plainness of his design. Since these conditions are true, how may we know the number of tons of steel that may be required for a structure until the drawings are completed. Therefore, as the specifications referred to drawings which were never ~~nearly~~ completed, even if they had been identified as required by the contract, and admittedly they were not, the amount of steel required could never be determined.

To bring out in strong relief the incomplete, uncertain and indefinite nature of this alleged contract, it is only necessary to put this inquiry: Suppose the defendant in error in this action had refused to furnish the materials contemplated by its proposal, and the plaintiff in error insisted that it was entitled to performance upon the part of the defendant in error, what structural material, with reference to tonnage, size, dimensions, character, etc., would the defendant in error be compelled to furnish? In the absence of plans, specifications and detail drawings, it would be absolutely impossible to determine just what would be required.

II.

EVEN IF IT WERE ASSUMED THAT THE PROPOSAL AND ACCEPTANCE CONSTITUTED A COMPLETED, VALID CONTRACT THE JUDGMENT MUST BE REVERSED BECAUSE NO DAMAGE IS SHOWN.

In the preceding main division of this brief we have shown that there is no valid contract, the breach of which would sustain an action for damages. The defendant in error in its three successive complaints filed in this action *insisted on maintaining an action for damages for breach of an express contract.* It does not seek to recover the value of the steel sold and delivered. In such an action plaintiff in error might have been compelled to admit judgment for the steel fabricated

and delivered, viz.: for $3021.90. Defendant in error elected to maintain its action for damages.

Assuming that the action is one for the recovery of damages for the breach of an express contract the general rule is that the damage recoverable is the difference between the cost of performing the contract and the contract price.

See

Hinckley v. Pittsburg Bessemer Steel Co., 121 U. S. 264;

U. S. v. Behan, 110 U. S. 338;

Sullivan v. McMillan, 8 So. 450 (Fla.);

Wells v. Association, 99 Fed. 222, 53 L. R. A. 33 (extended note);

Goodrich v. Hubbard, 51 Mich. 63, 16 N. W. 232.

The rule announced is subject to the qualifications that a reasonable deduction is to be made for the less amount of time required by the plaintiff, its employees and factory and for the release from trouble, risk and responsibility attendant upon a full execution of the contract on the part of the plaintiff.

Kimball v. Deere, 108 Iowa 685, 77 N. W. 1041-1044;

U. S. v. Speed, 8 Wall. 77;

McMaster v. State, 108 N. Y. 542, 15 N. E. 417.

In *Insley v. Shepard,* 31 Fed. 869, at page 873, the court said:

> "The plaintiffs' proof as to the amount of profits which they would have made by the performance of the work *is not disputed, or in any way contradicted by the defendants;* but the court must assume that there should be a reasonable deduction from this theoretical amount of profit for a '*release from care, trouble, risk and responsibility, attending a full execution of the contract*'. The execution of the contract in question involved considerable risk. The piers which were to be erected by the contractors might have been washed out by a freshet in the river; a span, or some portion of their trestle work might have been destroyed by high water; there might have been delays by bad weather, or inability to procure material, to such an extent as to have very materially reduced the theoretical profits upon this contract. The figures of the plaintiffs' witnesses are based on the assumption that there would be no drawbacks nor losses in the execution of the contract, when every practical man knows that losses and delays are as a rule encountered in almost every contract like this. Hence I have concluded to take 30 per cent from the theoretical profits which the plaintiffs' proofs show they would have made by executing this contract for the performance of such work."

In *United States v. Speed,* 8 Wallace (75 U. S.) 77, the plaintiff agreed to pack for the U. S. Government 50,000 hogs, which were to be furnished, together with materials for packing, by the government. The government after furnishing some 16,000 hogs refused to furnish the remainder, al-

though the plaintiff was ready to pack the same. Justice Miller, delivering the opinion of the court, said:

> "And we do not believe that any safer rule, or one nearer to that supported by the general current of authorities, can be found than that adopted by the court, to wit: the difference between the cost of doing the work and what claimants were to receive for it, making a reasonable deduction for the less time engaged, and for release from the care, trouble, risk and responsibility attending a full execution of the contract."

Sullivan et al. v. McMillan et al., 26 Fla. 543 (8 So. 450), was an action originally brought by McMillan and Wiggins to recover damages for the breach of contract in and by which plaintiffs agreed to cut and deliver logs of specified dimensions. One of the questions involved in the case was the cost of delivering a large number of logs at the rate of 100 logs per day requiring deliveries extending over a period of two years. Referring to this question and speaking of the testimony of one of the plaintiffs as to what it would have cost to deliver the logs in question, the court said (8 So. 463):

> "The absence from his statement of the number of teams it would have been necessary to keep on hand and employ to ensure their delivery of so many logs daily during so long a period is to our minds strong evidence in itself that he did not understand that he was speaking of such a proposition; but whether he did or not so understand we do not think his testimony was sufficient to justify a ver-

dict upon the basis of the delivery of 100 or any other number per day; for when he proceeds to itemize the expenses of delivering, *he omits certain elements of expense which, in view of the items he mentions, suggests themselves, and independent of which no verdict approximating justice can be rendered.* Had the contract been performed in full the value of the use of the teams required for performance would have been an element of expense. When he ceased to perform, his expense ceased; his teams then became free to be used in any other venture, and were no longer employed in this; or, if he had been hiring them from other persons, the cost of their use would have ceased. It cannot be that the plaintiffs are to be better off than they would have been if they had performed the contract; yet if the value of the use of, or the cost of hiring, the oxen which would have been employed in the performance of the contract is not included as an expense, it is certain that less expense is estimated, and consequently greater profit allowed, than would have been in case of actual performance. This item of expense, and we do not say there are not others of the same kind, is necessarily shown by the fact that teams are proved to have been used in the performance of the contract. It is of course to be distinguished from any item of expense which those given do not suggest as necessarily attending the performance of the contract. It is a patent defect in the testimony of the witness and destroys it as the basis of a just or legal verdict, whatever the number of logs to be delivered daily was."

In the case of *Masterson v. Mayor,* 7 Hill 61; 42 A. D. 38, at page 45, the court said:

"It is a very easy matter to figure out large profits upon paper; but as will be found, these,

> in a great majority of cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article, that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measures of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense independently of the outlays in labor and capital."

Another qualification to the general rule first above stated is expressed in the case of *United States v. Behan*, 110 U. S. 338. The facts of that case were as follows:

One Roy and the United States entered into a contract to improve the harbor of New Orleans, and later, upon the contract with Roy being annulled, the surety on Roy's bond was authorized to fulfill the contract. He went to expense in providing machinery and materials and did a portion of the work when the government finally cancelled the contract. The claimant thereupon sold the materials on hand. The Court of Claims allowed him for his actual expenditures in the prosecution of the work, together with the unavoidable losses on materials. The government appealed on the ground that by making a claim for profits the claimant asserted the existence of the contract and could only recover nominal damages if

he was unable to show that profits would have been made. The Supreme Court, however, speaking by Justice Bradley, in affirming the decision of the Court of Claims, said:

> "The prima facie measure of damages for the breach of the contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damages, namely: *first, what he has already expended toward performance (less the value of materials on hand);* secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when in the language of Chief Justice Nelson, in the case of Masterson v. Mayor of Brooklyn, they are the 'direct and immediate fruits of the contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the enjoyment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party who has voluntarily stopped the performance of the contract, can show to the contrary."

In connection with the general rule and its modifications hereinbefore stated we must remember that where the evidence shows actual damage, but fails to show with reasonable certainty the extent of such damage, plaintiff is entitled to nominal damages only.

See

R. R. Co. v. Town of Cicero, 157 Ill. 48; 41 N. E. 640;

Hudson v. Archer, 9 S. D. 240; 68 N. W. 541.

The principles of law announced above were covered by the instructions proposed by the plaintiff in error but which instructions the court refused to give to the jury. It instructed the jury on the general rule first above stated but ignored all the modifications of that rule which were peculiarly applicable to the facts of the case at bar.

The evidence clearly brought this case within the modifications of the rule above stated, but no instructions covering these modifications were given. It appears that the drawings were never completed and that delays would ensue awaiting their completion. All these delays in performance militated against the possible profit. This situation was indicated in the letter written by defendant in error to plaintiff in error on February 12th, 1907, nearly six weeks after beginning work. In that letter the president of defendant in error stated:

> " * * * there seems to be a considerable portion of the structure, the form and design

of which is yet unsettled. The architect may have all this clear in his mind, but has not made it clear to us through his representative, Mr. Smedberg, whom we understand has written several times for added information.

"It seems that Mr. Smedberg cannot be working in perfect harmony, for in being sent on such a mission as he is apparently sent here, he should be able to furnish us with such information and data regarding the structure, in advance of our work, so that we would not be handicapped and delayed as we have been thus far in the preparation of the detail drawings.

"We have not complete information as to how the steel frame should be built in its entirety. If we had this, we could make rapid progress. We can only depend on Mr. Smedberg and he undoubtedly had no knowledge of the requirements. He has approved three detail drawings thus far and we judge that there will be from 75 to 80 drawings on the building. We cannot go ahead as fast as we would like and complete as we go because of the information which is lacking. When we fabricate the steel for this building, we want to do it in some kind of rotation and the drawing work will be at a standstill, and we will be obliged to suspend work unless we are given the requirements to go ahead with. Had we known that Mr. Smedberg would not be in possession of all the information when he arrived here (which was the understanding between your Co. and the writer when in San Fran.), we would never have signed the contract, or begun any work until we knew that this information was all available, as it would only repeat a hundred unpleasant experiences. It is just dragging the whole matter into a muddle and the boys who are working on it

have already lost heart. Therefore please give us an order to suspend work until we know what to do, or in some way tell us what is wanted in this building.

"We put up a 3,000 ton job last summer in 93 days from the time we got the contract and it was only because all concerned knew what they wanted. This job of about 1,200 tons is going to drag for months at this rate and we will have to put other work in its place if we do not get a complete starting point at once" (Tr. pp. 223-224). See also Defendant's Exhibit "F" (Tr. p. 226).

Even the specifications made the performance of the alleged contract most onerous (Tr. p. 108).

There is no evidence allowing for time that would have been expended in carrying out the contract, nor is there any evidence of the saving resulting to the defendant in error by non-use of equipment and machinery.

As was substantially said in the leading case of *Masterson v. The Mayor etc.* (supra), it is one thing to figure profits on paper in advance of the performance of the contract and quite a different matter to perform the contract at the profits so figured.

Measured by the principles fixed by the above decisions, as applied to the evidence in this case, the trial court erred grievously in refusing instructions one (1) and two (2) proposed by the plaintiff in error. These instructions directed the jury to return a verdict for the plaintiff in error because:

1. The alleged contract was void;

2. There was no evidence showing either the *quantity of steel* to be delivered pursuant to the alleged contract nor the *cost* to the defendant in error for the full performance of said alleged contract.

These instructions presented basic propositions of law that had been repeatedly discussed in several demurrers before the trial court and also many times during the trial on objections to the introduction of evidence. *They go to the very fundamentals of the case. If there is no contract there is nothing to sustain the alleged cause of action.* If it be conceded for the sake of argument that the contract is valid, but that there is a failure of evidence in the number of tons of steel required by such contract, *then no damage was sustained by its breach* which can be recovered. By both instructions questions were presented that ran through the whole case from its beginning and the various rulings by the trial court on these questions at the successive stages of the case in that court constitute such *"plain errors"* that this court would notice them *even if they had not been assigned or specified.*

1.

The contract was void. This has been fully discussed in the preceding division of this brief, and need not be argued here.

2.

Neither by the alleged contract, nor by any paper exhibit nor any other document referred to therein, nor by any evidence in connection with such contract, *was there any showing made of the amount of steel to be delivered,* pursuant *to the terms* of the alleged contract. And, as a necessary consequence, there was not and could not have been any evidence or showing of *cost* to the defendant in error (Modern Steel Structural Company), of *the full performance of said alleged contract.*

The court instructed the jury that the contract *was valid,* "as alleged". This meant, according to the complaint, a contract for fifteen hundred tons. The court added that the contract *had been violated* by plaintiff in error and that the only question to be considered was the *amount of damages.* The counsel for plaintiff in error conceded, during the trial, as they do now, *that in an appropriate action,* viz: *for goods sold and delivered, the defendant in error would be entitled to a verdict for $3021.09, the cost of the steel delivered,* but not as damages for breach of contract. Unless this action can be considered as an action for goods sold and delivered, there should be *no judgment* for the defendant in error, even though plaintiff in error might *in a proper action* concede that judgment for the cost of the steel delivered should be awarded in favor of defendant in error.

The present action is for breach of contract. We contend that the evidence fatally fails to sustain the claim for damage.

The rule of law without the modifications applicable to this case, as admitted by all the authorities, is that the defendant in error should recover

> *"the difference between the cost of doing the work and what claimant* (defendant in error) *was to receive for it, making a reasonable deduction for the less time employed and for release from the care, trouble, risk and responsibility attending full execution."*
>
> *U. S. v. Speed,* supra,

and these elements must be sustained by *"that clear and direct proof which the law requires".*

> *U. S. v. Behan,* 110 U. S. 338.

Therefore, defendant in error was required to prove two essential facts:

(a) The cost of doing the work;

(b) The amount it was to receive for the work.

Both these elements depended absolutely on the quantity of *steel to be furnished.* The price per ton to be paid by plaintiff in error was fixed by *the proposal at $77 per ton,* but the proposal was silent on the *number of tons to be delivered.* Unless the number of tons can be ascertained, there is no way of determining either the *"cost"* of doing the work, or the *"amount"* defendant in error was to receive for performing the alleged contract. Without *"clear and direct proof"* of these ele-

ments, no judgment for defendant in error can be sustained.

To meet the demands of this rule of law, defendant in error claimed that the evidence showed that fifteen hundred (1500) tons of steel were required by the terms of the alleged contract. There is no record that any amount was to be delivered and the only evidence to sustain the claim is the testimony of *three witnesses* for defendant in error, viz.:

S. B. Harding, president of the defendant in error;

F. W. Harding, vice president of defendant in error;

Frederick W. Hoffman, an employee of defendant in error.

To show the *absolute want of any evidence on the question of the quantity of steel, we quote from their testimony:*

S. B. Harding said "about fifteen hundred tons", would be required because Mr. Vigus "talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it." The architect's plans were incomplete and in examining the plans, I found many discrepancies and from such investigation and discrepancies found, *think* that building would run up to 1500 tons, if not more (Tr. p. 130, p. 131).

Mr. S. B. Harding's opinion changed with a rapidity that is convincing proof of the unrelia-

bility of this character of testimony, for in two letters to the plaintiff in error written in February, 1907, he stated "about 1200 tons" would be required (Tr. pp. 224, also 227).

Frederick Hoffman, an employee of defendant in error, testified (Tr. pp. 176-178):

> *"To a certain extent I am familiar with the plans and* specifications for the Columbia Theatre job at San Francisco, which came into the shop of the plaintiff early in January, 1907. *At that time I knew, from the plans and specifications, the length, width and height of the building, and generally in regard to its dimensions. I had nothing to do with the making of the detail drawings.*
>
> Q. From your examination of the drawings and specifications of the building, in your judgment, what quantity of structural steel was required to carry out the plans and specifications for the Columbia Theatre Building in question?
>
> A. In my judgment, it would take in the neighborhood of 1500 tons.
>
> The WITNESS (continuing). That would be a fair estimate; I arrived at approximately 1500 tons of structural steel by my past experience, considering buildings of similar construction and size, and considering the plans and specifications and the city ordinances of San Francisco, covering such buildings at that time. I had before me the city ordinances and specifications. I have no interest in this litigation."

On cross-examination he testified:

> *"I did not take off the quantities from the plans of the Columbia Theatre building. I said it would take 1500 tons of steel because I just*

estimated that on past experience with other buildings and passed my judgment on the specifications and what they called for. It was only an estimate."

F. W. Harding, vice-president of the defendant in error, testified (direct examination):

"* * * I can state very approximately that at least 1500 tons of steel would have been required to construct that building. * * * *Although it never* became part of my duty to remember quantities, but I was required to place valuations on work. *The estimating of quantities would be done by our clerical force"* (Tr. p. 182).

On cross-examination he testified:

"I estimated that 1500 tons of steel would be required for the building, but I could not take the quantities to determine that. I had to take the cubic-foot rule, because the general drawings were not completed for the entire building, but we knew the size of the building" (Tr. p. 201).

This is the only suggestion of testimony in the record to prove the quantity of steel that was required to be furnished under the alleged contract. This is all there is on the subject, yet the court instructed the jury that the contract as alleged was proved. The alleged contract was *pleaded in legal effect* and it was alleged that it was a contract to furnish 1500 tons of steel (Tr. p. 44). Where is there any evidence of such a contract? Where is there any support for the court's instruction?

There is no testimony on the amount of steel to be furnished.

S. B. Harding expresses his opinion of 1500 tons because some one "talked about" that amount.

Frederick Hoffman, on cross-examination, knew nothing. He simply "estimated"—the better word would be "guessed".

F. W. Harding admitted he knew nothing about taking quantities, but stated "very approximately that at least 1500 tons". It was not a part of his business to remember quantities but he remembers this amount (Tr. p. 182). *The only people who did the estimating of quantities for the defendant in error*—members of its clerical force (Tr. p. 182)—were not called to testify. Why not? The testimony of witnesses S. B. Harding, Frederick Hoffman and H. A. Sell was taken at the plant of defendant in error where all its clerks were and *while they were present.* Why were they not invited to testify? *Because they would have been compelled to answer that there was no means of determining the number of tons.* They would have testified with witness Breite (Tr. pp. 234-235) that before the number of tons of steel for any particular big building may be determined, there must be a complete design showing each steel member that enters into the building and that without the complete design it is not possible to determine the tonnage. Without that complete design it is impossible to tell the number of tons because there

is no way of knowing the size or shape of the steel beams, girders, columns, trusses or cantilevers. Every architect has his own idea of beauty. Every architect determines for himself whether he will adopt the more expensive truss construction or adopt the column plan of construction. He may prefer heavy or light construction. He may build for today, or so design the contemplated structure that it will carry extra stories. But until the design and drawings are completed no one can determine these elements. Even the architect does not know until he is advised of the amount the owner is willing to spend. The drawings showed the space the theatre would occupy but without any size, or figures or dimensions on it from which one could draw any conclusion whatsoever.

All the witnesses agreed that it would not be possible to "cube" such a building because the engineer or the man trying to "cube" the building cannot put himself in touch with the architect's idea or his plan of construction. The architect may design some very elaborate architectural features that require much more steel than other features, and until the design is completed it would be impossible for a man to cube up a theatre building, or a hall, or a church or a large auditorium or building of any such character. And agreed with witness Galloway (Tr. p. 248) that the method of ascertaining the weight of steel in a building of this character by "cubing it" is

regarded merely as a general method and is in no sense of the term accurate; that on account of the complications entering into a theatre building and design of a theatre building, it is impossible to tell the total weight of structural steel in such a building without knowing the design; that the only way to determine the weight of steel for such a building would be to have plans prepared and estimates made, piece by piece.

F. W. Harding, the vice-president of the defendant in error, when he was not thinking of the necessity of establishing that *1500 tons* of steel would be required to complete the building, testified as follows:

> "We cannot tell how to fabricate the steel until we have the design from the architect; until *we have that design we don't know what the members are going to consist of absolutely.* If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect" (Tr. p. 225).

If, until they have the design from the architect they could not tell of what the *members consisted* how could they tell the weight of "steel members" they did not know? Who is to say how long or how short, how heavy or how light, how thick or how thin they may be designed.

This is not a case where there is any conflict in the testimony. It is a case where there is al-

most perfect agreement among the witnesses on material facts. All agree that there was no *meeting of minds* on an *essential element of the alleged contract*—the drawings that were never completed. All agree there was no *meeting of minds* on the drawings and designs for the theatre portion (this constituted more than one-half of the combined office and theatre building) and on the amount of steel to be furnished. These essential elements were *"to be furnished"* but were never furnished. The result is there is no contract and no way to determine the cost of performing it to the defendant in error or the price to be paid on performance by plaintiff in error. Both parties took chances on the ultimate completion of the contract. It was never completed, and the law declares there is no contract and consequently there can be no action on the alleged contract.

The witnesses even agree that the number of tons of steel in a proposed building where there are no complete drawings cannot be determined by "cubing" and that it is absolutely impossible to determine the number of tons until the design is known, if the proposed building is a church, theatre or auditorium, or any building where there must be great spans and considerable truss work. *This is the testimony of John D. Galloway, structural steel engineer, and it was not disputed by any of the witnesses for the defendant in error* (Tr. p. 248). W. Breite corroborated him (Tr. p. 235).

This testimony shows there could be no evidence of either:

(a) The cost to defendant in error of doing the work.

(b) The amount defendant in error was to receive on the completion of the alleged contract, because:

There was no way of knowing the quantity of steel required to be furnished.

Even if we assume the amount of steel "to be furnished" could be determined, there is no evidence of its cost to defendant in error.

The officers of the defendant in error should be better informed than any one else of "its cost" of doing the proposed work. Unless they knew this cost and gave evidence of it, the jury's verdict rests on *speculation and conjecture.*

It is apparent there was no less "speculation and conjecture" with the officers of the defendant in error than with the jury.

On the 25th day of January, 1907, the president of the defendant in error wrote:

> "Now, if you can buy this job *one cent cheaper anywhere* we will be very much pleased to relieve you from the obligation to us" (Tr. p. 188).

Evidently, then, he did not think there was $30,000 profits in the alleged contract. Nor did

he believe there was this fortune in a contract for about $115,500, the amount he fixes as the total contract price, when, on January 31, 1907, he wrote:

> "He admitted that he did, and the writer said to him that we regretted that there was any misunderstanding between yourself and the writer as we felt in the whole transaction *that we were more carrying out the obligation made by G. W. Harding of Los Angeles than anything else as we were so filled up with work, and the writer further said that we would be pleased if we could sublet it to some one and get out even and at the same time serve you,* but if we could not we were going to stick by and fill the order" (Tr. p. 196).

But a little over two months later this immense profit unexpectedly appears.

The bankruptcy of the Richelieu Realty Syndicate prevented the completion of the contract. The "inexperience" and "unfamiliarity" (these are the words of the president of defendant in error) of plaintiff in error with the overnight growth of profits in, and the method of, the steel business prompted it to wire the true conditions to defendant in error and ask it to telegraph its lowest figures in settlement of the matter. Probably defendant in error's knowledge of this "inexperience" and "unfamiliarity" of plaintiff in error furnished its answer. It asked $30,230 (Tr. p. 138). It was asked for an itemized statement of its claim and defendant in error itemized it as follows:

Material as per accompanying 4 sheets—weight—275481 lbs. at $1.90 unloaded in our yard	$5234.14
Car of steel invoiced	3021.09
Expenses and advanced J. D. Smedberg	350.00
Shop drawings	1441.53
Unused shop space lying idle	20183.24
Total	$30230.00

(Tr. p. 149).

Included in this figure is the item "Expenses and advanced J. D. Smedberg $350". This "loan" is another item of profit that probably is charged to "inexperience" and "unfamiliarity".

The attorneys for the plaintiff in error were dissatisfied with this so-called itemized statement and wrote defendant in error for additional information. It replied under date of October 15, 1907, that the former figures were made up "somewhat hurriedly" and then fixed the damages at $30,-931.23 (Tr. p. 211). This estimate of its damage by the alleged breach covers three pages of the transcript of record (Tr. pp. 217, 218, 219) and includes in addition to the actual cost, "overhead expenses", namely a percentage of the costs added to the cost and estimated as the general expenses of doing business. The trial court refused to allow the plaintiff in error to show these "costs", holding they were not part of the cost of the contract.

The next estimate of the damage is given in its original complaint and the sum demanded is again changed to $30,881.23 (Tr. p. 10).

The first amended complaint asks the same sum, but the second amended complaint fixes the damage at $35,164.17 (Tr. p. 47).

The president differed from all these in fixing the cost of doing the work under the alleged contract as he fixed the damages at $34,470 (Tr. p. 156) while the vice-president differed from the president and all others and fixed it at $29,637 (Tr. p. 186).

There must have been at least *six different estimates of the "cost"* to defendant in error of doing the work under the alleged contract as the contract price was fixed in all these estimates at $115,500. The law requires this element of "cost" to be established with certainty. How can there be any certainty when the men who were to do the work are unable to agree on its cost?

It is worthy of notice that all these estimates seem to fix the damages at about $30,000. Whether the item of "overhead expenses" *is included or not,* the damages are fixed at about $30,000.

By letter written on the 15th day of October, 1907, the total damage by the alleged breach is fixed at $30,230 (Tr. p. 219). In this total sum the item of "overhead expenses" is charged to the cost of this contract. This item of "overhead expenses" properly chargeable to this contract is fixed at $7171.23 (Tr. p. 164).

The testimony at the trial did not include the "overhead expenses" as part of the cost and the

damage therefore should be $7171.23 greater than $30,230, but F. W. Harding fixes it at $29,637 (Tr. p. 186). Could there be more speculation, conjecture or uncertainty than that with which the witnesses for, and officers of the defendant in error, clothed the element of cost?

By the testimony of S. B. Harding, president of the defendant in error, the damages are fixed at $34,470 (Tr. p. 156). In his estimate of the cost for doing the work he does not include any part of the "overhead expenses" and yet he admitted that properly such "overhead expenses" should be distributed proportionately over all contracts. S. B. Harding testified (Tr. p. 169) as follows:

> "Q. Your overhead expense, as I understand it, is for the general management of the business of the Modern Steel Structural Company, applying to all contracts and all work being done by that company?
> A. Yes, divided proportionally."

By this testimony, the damages claimed by the defendant in error *without allowing any portion of the overhead expense* as part of its cost were fixed at $34,470 (Tr. p. 156); the damages fixed by Mr. Simpson, the secretary of the Company, in his letter of October 15, 1907, and in which he allowed as part of the cost of doing the work a proportion of the overhead expense, were $30,931.23 (Tr. pp. 211-222). The more we read the more uncertain the situation becomes.

It is admitted that the "overhead expense" of the defendant in error during the time the contract in

question was being fulfilled by it, amounted to $86,055.76 annually, or $7171.23 per month (Tr. p. 164), and that one-third of the plant of defendant in error for a period of from sixty to ninety days (in the absence of delay) would be used in completing the contract in question (Tr. p. 171). Hence the overhead expense that should be charged against this work would be at *least* $7171.23. Despite the testimony of S. B. Harding, the lower court prevented the "overhead expense" being considered as part of the cost of the work nothwithstanding he testified that every item of "overhead expense" bore on the cost of doing this work (Tr. pp 163-164).

THAT NO DAMAGES WERE SUSTAINED IS ALSO APPARENT FROM THE FACT THAT THE EVIDENCE SHOWS WITHOUT CONFLICT THAT DEFENDANT IN ERROR WOULD NOT HAVE MADE ANY PROFIT—BUT WOULD HAVE LOST MONEY—IF THE CONTRACT HAD BEEN PERFORMED.

We shall demonstrate by the testimony of the witnesses of defendant in error that it would not have made a profit—but would have lost money if the contract had been performed, and that the attempt to procure profits was an effort to coin the misfortunes of plaintiff in error into false profits for the defendant in error.

In this demonstration we shall rely on the records and the testimony offered by the defendant in error.

During the taking of the first deposition of S. B. Harding at Waukesha, afterward superseded by the deposition received in evidence at the trial, plaintiff in error obtained a copy of *the cost sheet* of the work performed under the alleged contract in this suit. This deposition was taken more than *two years before the trial.* The fact that plaintiff in error had a copy of this record was forgotten until it was produced in court during the cross-examination of witness F. W. Harding at the close of the case of defendant in error. Its real effect will be more clearly apparent now. This *"cost sheet"* in connection with the testimony of witnesses for defendant in error proves to a mathematical certainty that the work under this contract could not have been finished at a profit.

In cases of this kind it is usually most difficult to meet the claim for damages. The claimant asserts that its cost for doing the work would be a certain figure, which cannot be disputed except by its own books which are often in such form as to add to the general confusion. If you prove the cost to another firm for doing the work the claimant usually answers that his methods, *or something else,* reduces the cost. Here by a chance of kind fortune, we are able to overcome by the records and sworn testimony of the claimant any such unwarranted claim.

The cost sheet of the Modern Steel Structural Company (defendant in error) for the contract in question is printed in the record (Tr. p. 205) but through the inadvertence of the printer it is headed

"Ledger Sheet American-Pacific Construction Company". This error was corrected at the oral argument, and the cost sheet now appears as that of the Modern Steel Structural Company.

In this "cost sheet" are included all the cost incurred by the Modern Steel Structural Company (defendant in error) in performing the alleged contract.

> "I hand you this (referring to above cost sheet) and ask you if that is not a copy of the detailed cost sheet of your work for the 39¼ tons?
>
> A. No, sir; *I should say not. It includes all the work done on this contract* up to a certain date. It includes some draughting, office labor and shop labor and freight charges not solely relating to the 39¼ tons.
>
> There is nothing that I see that sets out the work but I know by our general methods of cost keeping that the records of all the work of every nature on the contract would go into the office and naturally this would be the record of this contract and all that we did up to that date."
>
> "Q. Is that a copy of your ledger showing the work done, the drawing labor, the fabrication, or rather, the shop cost?
>
> A. It seems to be.
>
> Q. Is there any question about that being a copy of the page from your ledger?
>
> A. No, there is no question.
>
> Q. And the page of the ledger that refers to this contract, the contract with the American-Pacific Construction Company?
>
> A. Yes.
>
> Q. When you receive a contract you give it a number?

A. Yes.

Q. What is the number of the American-Pacific contract?

A. 561.

Q. That is a record of the work done under that contract?

A. Yes."

(Cross-examination F. W. Harding, Tr. p. 203.)

"Q. Do you know whether or not that ledger account was closed and when it was closed?

A. Closed, and possibly shown right here. I should say after that part of the work was performed (referring to entry on exhibit 'B'). We have not entered on that account there what the American-Pacific Construction owes us.

Q. You mean for future profits that you would have earned if that contract was carried out?

A. We are carrying such an account on our books.

Q. Which account includes what you estimate would be your profit? That account was closed when this litigation began by the notation on it 'in litigation'?

A. This account was closed.

Q. In so far as entries being made upon it?

A. Yes.

Q. And entries were made upon that account up to the time this litigation began?

A. Of this nature."

(Recross examination of F. W. Harding, Tr. p. 230.)

"Redirect Examination.

Mr. TAYLOR. Q. *Mr. Harding, the sheet that you have presented here presents the actual items you have paid out as costs. Is that correct?*

A. *Yes.*

Q. *And does not embrace the damages by reason of the breach of contract?*

A. *No, sir.*

Q. *There is nothing stated in that about a breach of contract?*

A. *No, sir.*"

(Redirect examination of F. W. Harding, Tr. p. 231.)

Hence this sheet represents the actual cost to defendant in error of all work done by it under the contract in question.

What was the work done under this alleged contract?

"No steel was fabricated other than the 39¼ tons shipped to the plaintiff in error."

See cross-examination F. W. Harding (Tr. bottom of p. 230 and p. 231).

Consequently, we seek to know the cost of the work that did not relate solely to said 39¼ tons. The answer is in the record: "It includes some draughting, office and shop labor and freight charges not solely relating to the 39¼ tons" (Tr. p. 203). To obtain the cost of the 39¼ tons we must deduct the other items of cost.

The "cost sheet" shows that the entire freight and cartage included therein is $9.73 (Tr. p. 205) and Mr. S. B. Harding, president of defendant in error, contradicts Mr. F. W. Harding as he testified the charge of $9.73 was for cartage on the 39¼ tons (Tr. p. 160). However we shall accept the version

most favorable to defendant in error and omit it from the cost of 39¼ tons. The only other work done under the contract was the preparation of some templates.

> "Q. It is also a fact, is it not, that the only work that you did under this contract was the fabrication of 39¼ tons of steel?
>
> A. Yes; and the preparation of some templates, etc., for the plans.
>
> Q. Then, I understand that the entire work that has been done by the Modern Steel Structural Company under this contract consist of the fabrication of 39¼ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the 39¼ tons of steel which have been delivered and for work that you expected to do and the preparation of templates for the work that was delivered and for future work?
>
> A. Yes, and the ordering of steel.
>
> Q. Now, is there any cost to the ordering of steel?
>
> A. We do that with our office force under the head of 'overhead expenses' " (Tr. p. 162).

The insignificance of the cost of templates is apparent from the testimony of F. W. Harding (Tr. p. 183; p. 185).

Only drawings for 256 tons of steel were prepared (Tr. p. 237) and templates could not be made for more tonnage than there were drawings finished (Tr. p. 183) and the templates for the difference in tonnage between 256 tons and 1500 tons or 1238 tons would cost only $32 (Tr. p. 185) and the labor would be inconsiderable. Only 161¼ tons of steel were delivered from the rolling mills to the works of defendant (Tr. p. 167).

Two facts established beyond all question are:

1st. Thirty-nine and one-quarter tons of steel for office building were fabricated and delivered.

2nd. Drawings were finished for 256 tons and no more.

Testimony of F. W. Harding, Tr. p. 201; p. 183; p. 206.

Testimony of W. M. Breite, Tr. p. 237.

Testimony of P. Zucco, Tr. p. 241.

This is not disputed.

On the basis of 1200 tons, this would be, according done. In point of tonnage it was one-fifth, but in point of drawings or drawing work it was one-tenth.

Tr. p. 237.

to Mr. Breite, one tenth of all the drawings to be

This is likewise not disputed.

By the "*cost sheet*" this drawing labor (without overhead) is shown to have cost $669.28 for one tenth of the work. The whole would have cost on that basis $6,692.80.

By the same cost sheet, the shop labor for 39¼ tons is $328.64 (without overhead), or $8.37 per ton, which is about the price all the experts agree the shop labor is worth.

But Mr. F. W. Harding says there was other shop labor included in those figures. What could it have been?

S. B. Harding's testimony is:

"Q. Then, I understand that the entire work that has been done by the Modern Steel Struc-

tural Company under this contract consists of the fabrication of 39¼ tons of steel, which you delivered to the American-Pacific Construction Company at San Francisco, California, the preparation of drawings for the 39¼ tons of steel which had been delivered, and for the work that you expected to do, and the preparation of templets for the work that was delivered and for future work?

A. Yes. And the ordering of steel.

Q. Now, is there any cost to the ordering of steel?

A. We do that with our office force under the head of overhead expenses" (Tr. p. 162).

F. W. Harding says:

"Mr. HUMPHREY. Q. Did you fabricate any work other than you shipped to us?

A. On this contract?

Q. Yes.

A. No, sir, I do not believe that we did fabricate any other" (Tr. p. 203).

Now, if they did not fabricate any but 39¼ tons, the other shop labor must be for the mere handling (not for the fabrication) of the difference between 161¼ tons and 39¼ tons, or 122 tons (Tr. p. 167).

For the 122 tons the cost of handling at 13 cents per ton (Tr. bottom page 159) would be $15.86. Deducting this from $328.64, the total cost of shop labor, we have $312.78 as the "shop cost" of the 39¼ tons, save a small deduction for some templates that were made. This item is admittedly so small that it is immaterial. However, we shall deduct from our above showing of $8.37 per ton for "shop labor cost", $0.37 as a most liberal allowance per ton for labor in making templates.

Based on the figures shown by this "Cost Sheet", we are able to demonstrate the cost to defendant in error of purchasing, fabricating and delivering 1200 tons of steel (which amount we base on the letters of defendant in error of February 12, 1907 (Tr. pp. 224, 227), under the alleged contract:

DRAWING COSTS:

Breite and Zucco testified, without contradiction, that the drawings attached to the depositions on file showed only 256 tons of steel, and that this was but one-tenth of the total drawing work to be done. (Tr. pp. 237, 241.) On the "Cost Sheet" figures of $669.28 for doing this one-tenth of the drawing work, the total drawing work would cost ..... $ 6,692.80

SHOP COST.

The evidence and "Cost Sheet" show that the entire shop cost of 39¼ tons and the making of templates for additional work amounted to $328.64, or $8.37 per ton; and that the sum of $.37 cents per ton was a most liberal allowance for the shop cost of templates, and therefore the shop cost per ton for all work other than templates, on the 39¼ tons, would be $8.00.

(Note: Both the drawing cost and shop cost given above are figured in connection with the steel for the office portion of the building, as distinguished from the more expensive theater portion, the 39¼ tons referred to in the "Cost Sheet" being material for the store portion of the building.)

Assuming the office portion of the building to be at least 50 per cent. of the combined theater and office building—and all agree the office portion was less than 50 per cent. thereof—we have the following:

Shop Labor Cost for Office Portion:

600 tons @ $8.00 per ton	4,800.00

The shop labor for the theater portion would cost at least 50 per cent more (Snyder, Breite, Zucco and Harding).

Hence, adding 50 per cent. to the cost of the shop labor of the office portions of said building, we have

Shop Labor Cost for Theater Portion:

600 tons @ $12.00 per ton	7,200.00
Total Shop Labor Cost	12,000.00
Total Drawing Labor Cost	6,692.80
Total Shop and Drawing Labor Cost	$18,692.80
Cost of 1200 tons of steel @ $38.00 per ton (Tr. p. 165)	45,600.00
Freight on 1200 tons @ $15.00 per ton (Tr. p. 165)	18,000.00
Total (carried forward)	$82,292.80

Brought forward	$82,292.80
But the above Drawing Cost is figured on the basis of the drawing cost for an office building, and it is admitted by all and testified to by Harding, Breite, Snyder and Galloway, that the drawing cost for the theater portion of the combined building would be at least $4.10 per ton more than the drawing cost for the office portion.	
Therefore we must add $4.10 per ton for at least one-half of 1200 tons, or the sum of	2,460.00
Hence the *total cost* is	$84,752.80

But

1200 tons @ $77.00, the alleged contract price=	$92,400.00
Total cost of doing the work, as shown above=	84,752.80
Leaving, on the basis of the figures of defendant in error, without deduction for "overhead expenses"; freedom from risk and trouble attending full performance, less time required, etc., (referred to in *United States v. Speed,* and other cases, *supra)* an apparent profit of only	$ 7,642.20
And by the testimony of the president of defendant in error the "overhead expenses" properly chargeable to this risk amounted to	$ 7,171.23
Hence, without deduction for freedom from risk, trouble, (U. S. v. Speed, supra), etc., and only charging "overheads" the apparent profit, on the figures of defendant in error, cannot exceed	$ 475.97

The above computation, covering the entire 1200 tons of steel, necessarily assumes the payment of the 39¼ tons of steel fabricated by plaintiff, but does not charge against the "Cost" the cost of material for templates, of power, freedom from risk and trouble, and time saved, and other hazards and incidents that would naturally attend the performance of a contract so prematurely conceived and so haltingly undertaken as was the one here in question. If these last-mentioned items were considered, the apparent profit of $475.97 would be changed into a large loss.

The figures of $7171.23 is testified to be the monthly "overhead expenses" of defendant in error (Tr. p. 164). It is also testified that the alleged contract would require at least one-third of the plant of defendant in error for three months or the whole of the plant for one month. Hence the "overhead expenses" chargeable to this alleged contract is $7171.23.

The figures showing the loss defendant in error would sustain in the performance of the alleged contract are no different than it expected when it wrote in the letters of January 25, 1907, and January 31, 1907, that it would be pleased if it could "get out even" (Tr. pp. 188, 189, 196).

III.

VARIANCE.

(a)

The complaint alleged a contract for the fabrication and delivery of an *agreed amount* of steel, to wit: 1500 tons (Tr. p. 44). There was no proof of any contract or agreement. A proposal, alleged specifications, opinions and "guesses" of the amount of steel that would be required for unfinished and probably unconceived drawings were received in evidence and all absolutely negative the idea of any agreement on the amount of tonnage.

(b)

The allegations were that the deliveries under the contract were to be made by September 1, 1907 (Tr. pp. 43-44).

There was no evidence offered of such a contract. On the contrary, the only evidence showed that deliveries were to be made:

> "DELIVERY: As follows: That portion indicated by Mr. Smedberg shown within red lines on blue print, 3-S, 4-S, 7-S, dated by us on the back of print as received Dec. 31, and 8-S, dated by us on the back of print as received January 3, 1907, required to begin the erection of steel work on stores, to be shipped from our shop thirty days from our receipt of approved working detail drawings, signed by Mr. Smedberg. Balance of steel shipments to be 60 to 90 days from our receipt of balance of approved working detail drawings, signed by Mr. Smedberg from date of approval" (Tr. pp. 2-3).

This is a complete variance and sufficient to defeat the claim of defendant in error.

IV.

UNDER THE TERMS OF THIS PROPOSAL OR ALLEGED CONTRACT IT WAS NECESSARY FOR THE DEFENDANT IN ERROR TO SUBMIT TO ARBITRATION ITS CLAIM BEFORE INSTITUTING THIS ACTION.

The provision of the contract in this action is as follows:

> "In case any difference of opinion shall arise between the parties to this contract, in relation to the contract or work to be, or that has been performed under it, such difference shall be settled by arbitration by two competent persons, one employed by each party to the contract and these two shall have the power to name an uninterested umpire, whose decision shall be binding on all the parties to the contract" (Tr. pp. 4, 5 and 193).

In *Holmes v. Richet,* 56 Cal. 312, the Supreme Court of that State said:

> "By the terms of the contract, authority was given the architect to decide any dispute that might arise respecting the true construction and meaning of the drawings or specifications and upon all such questions his decision should be final; but upon the question of extra work, he was not authorized to decide. On the contrary, by the express terms of the contract, such disputes, were to be referred to two competent persons, and if they could not agree, the services of an umpire were to be invoked. Was it competent for the parties to make such a stipulation? It has been frequently decided, and now seems to be the settled law, that an agreement to refer a case to arbitration will not be regarded by the courts,

and they will take jurisdiction and determine a dispute between parties notwithstanding such an agreement. *But that is not this case.* Here the parties simply agreed that the amount or value of certain extra work should be fixed in a certain manner, and was there any right of action in this case for and on account of said extra work until the value thereof was fixed according to the terms and conditions of the contract? In other words, was it not a condition precedent to any right of action, that the value of the extra work should be determined in the mode provided by the contract? This question was very elaborately considered by the Court of Appeals of New York, in the recent case of The President, etc. v. The Pennsylvania Coal Company, 50 N. Y. 250. The Court there says: 'The distinction between the two classes of cases is marked and well defined. In one case, the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and difference by arbitration, to the exclusion of the Court; and in the other they merely by the same agreement which creates the liability and gives the right, qualified the right by providing that, before any right of action shall accrue, certain facts shall be determined, or amounts and values ascertained and this is made a condition precedent, either in terms or by necessary implication. This condition being lawful, the Courts have never hesitated to give full effect to it. * * *''

DISCUSSION OF "BRIEF FOR DEFENDANT IN ERROR".

Defendant in error answers the arguments advanced for the reversal of the judgment entered in this action by insisting that the exceptions upon

which the errors are predicated were not properly assigned and that the charge of the court announced correct principles of law. It argues further that the plaintiff in error was estopped from contending that the evidence did not show that the defendant in error had been damaged by the alleged breach (assuming for the moment the alleged contract to be valid) because as defendant in error urges, the alleged unlawful act of plaintiff in error prevented the contract and drawings from being completed from which the exact tonnage to be fabricated could be determined. *This is indeed the announcement of a new principle*—the party breaking a contract may not insist upon the injured party proving his damage. The absurdity of this contention is quite apparent. But in the case at bar it was the Richelieu Realty Syndicate—*not the plaintiff in error, that refused to complete the drawings and the contract. It was the Richelieu Realty Syndicate, not plaintiff in error,* that employed and controlled the architect and engineer to prepare the drawings. Plaintiff in error was the *unfortunate middleman* and could not carry out its proposal with defendant in error because the *Richelieu Realty Syndicate* became bankrupt and was unable to, and refused to, have the drawings made or the building built. Its abandonment necessarily forced plaintiff in error to advise defendant in error to proceed no further with the work.

We shall reply to the various contentions of defendant in error in the following order:

1. All errors discussed in the brief of plaintiff in error are based upon "sufficient exceptions" and "assignments of errors".

2. The form of taking the exceptions is the basis of the objections of defendant in error. It does not contend that no exceptions were taken. We insist that even if *no exceptions were taken* that the propositions advanced for the reversal of the judgment were urged and discussed so repeatedly before and during the trial of the action and are so substantial and vital to the case that they became "plain errors" which this court will consider without exceptions or assignments of error.

3. The court's rulings and instructions on the vital questions involved in this action, viz: existence and validity of *the alleged contract and the proof of damages required* were glaringly erroneous.

4. Plaintiff in error was not estopped from requiring legal proof of the alleged damages.

I.

ALL ERRORS DISCUSSED IN THE BRIEF OF PLAINTIFF IN ERROR ARE BASED UPON SUFFICIENT EXCEPTIONS AND ASSIGNMENTS OF ERROR.

Plaintiff in error is not urging any error of a technical nature. It bases its demand for a reversal of the judgment on the most substantial grounds. It contends that the alleged contract is void, but even

if valid that there is no, and could be no, evidence of damages, and that there was a variance between the contract alleged and the one sought to be proved. There is also the additional proposition that the action is premature. All discussions revolve around these main propositions and the errors upon which these discussions are based were not only on "Instructions", but upon rulings on successive demurrers and on the admissibility of evidence.

The question of the validity of the alleged contract was raised when it was offered in evidence by the following exceptions:

Exception No. 2, Tr. pp. 97-98-99;
Exception No. 3, Tr. pp. 103-104;
Exception No. 4, Tr. p. 105;
Exception No. 5, Tr. p. 125;
Exception No. 6, Tr. p. 128;
Exception No. 7, Tr. pp. 130-131;
Exception No. 10, Tr. pp. 231-232-233.

Refusal of the court to give instructions proposed by plaintiff in error (Tr. pp. 281-290).

The error made by the denial of the motion for non-suit (Tr. pp. 231-233) can be urged on appeal, as plaintiff in error at the end of the trial requested the court to instruct the jury to return a verdict for the defendant (Tr. pp. 280-281).

Errors based on the failure of proof of damages were based on proper exceptions and assignments.

See exceptions quoted under the first proposition. Also

Exception No. 7, Tr. pp. 130-131;
Exception No. 8, Tr. p. 177;
Exception No. 9, Tr. p. 181.

In view of the foregoing and of the further fact that the requested instructions were numbered, and were as a rule brief and confined to single propositions of law, some of which were not contained in any form in the charge, others being clearly at variance with the charge, it is submitted that the exceptions in question were sufficiently specific to satisfy the rule requiring specific exceptions.

The questions presented by exceptions to various rulings on the admission of evidence, as we have seen, raise all the questions discussed in this brief. Defendant's Exception No. 7 (Tr. pp. 130-131) had reference to the overruling of defendant's objection to a question asked and the motion to strike from the record all of the answer of S. B. Harding except the word "Yes" in response to a suggestion that it would require to complete the building "1500 tons at least according to these specifications?"

After answering "Yes", the witness went on to say:

> "and my reasons for that statement would be this: The American Pacific Construction Company, through Mr. Vigus, talked of 1400 tons; the architect and his engineer talked of 14 or 1500 tons, as I remember it. Now the architect's plans—I am speaking now of the original

> plans from which we made our detail drawings—were incomplete at the time we began work, and Mr. Smedberg came up for the purpose of completing these drawings, and in so far as we went in examining the original drawings prepared by the architect, we found a number of places where they were not up to the ordinances, and that was the occasion of our writing our letter of March 26, marked 'Exhibit O' calling attention to the discrepancies, and I, therefore, from such investigations and discrepancies found, think, that the building would run up to the 1500 ton mark, if not more, as these increases spoken of are 20 per cent, or 25 per cent. Of course this would not apply to all the structure."

In view of the fact that the action was on an express written contract, for a quantity of steel "estimated at fifteen hundred tons", it would naturally be supposed that the contract sued upon would be examined for the purpose of determining, or affording a basis for determining, the important question of the quantity of material covered by it. Instead of this, however, the offered evidence was that the plaintiff in error, "through Mr. Vigus *talked* of 1400 tons; the architect and his engineer *talked* of 14 or 1500 tons", etc. Even if mere oral remarks were otherwise admissible as evidence, still so far as the plaintiff in error is concerned, what the architect and his engineer, representing the Richelieu Realty Syndicate talked of, would of course not be binding upon plaintiff in error and in any event mere conversation would not indicate a final conclusion upon the question of quantity. But if the

talk referred to occurred before the contract was signed, then of course evidence of it would not be admissible, under the well known rule merging prior negotiations in the written contract. In this case, the contract pointed out a definite method for determining the character and quantity of the material. Therefore, any talk, *whether prior or subsequent* to the execution of the contract, would be inadmissible for the purpose of arriving at the matter of quantity by any other method than the contract method.

We do not think the language of the proposal raises any doubt upon the proposition that both parties understood that the matter of the character and quantity of the material proposed to be furnished was to be left open until agreed upon in the form of working detail drawings to be prepared, and to be approved by the consulting engineer Smedberg.

The questions thus presented by the exception we have been considering (Exception No. 7) brings us, by a side path, to the main conclusion for which plaintiff in error contended in the court below by its objections and exceptions to the admission of evidence, by its motion for a nonsuit, and by its exceptions to certain instructions requested and refused and to portions of the charge to the jury. We respectfully submit that, so far as concerns the main purpose of the action, as disclosed by

the pleadings and the evidence—namely, the recovery of damages in the way of prospective profits based upon a subject-matter that was never agreed upon by the parties—a plain and grievous error in point of law was committed by the trial court, preventing plaintiff in error from availing itself of the application to its case, *upon the evidence,* of well established principles of law.

2.

The form of taking the exceptions are the basis of the objections of the defendant in error. It does not contend that no exceptions were taken. We insist that even if no exceptions were taken that the propositions advanced for the reversal of the judgment were urged and discussed so repeatedly before and during the trial of the action and are so substantial and vital to the case that they become "plain errors" which this court will consider without exceptions or assignments of error.

"Plain errors" not assigned or specified may be noticed by this court.

See:

Rule 24 of Rules of the United States Circuit Court of Appeals.

As a general rule, exceptions to the whole of the charge of a court, or to its refusals to instruct, will not be considered by an appellate tribunal, still, having in view the reasons upon which the

rule is based and the manner and circumstances in which the exceptions here in question were taken and the character of the exceptions, we submit that the rule is not applicable here.

In *Price v. Pankhurst,* 53 Fed. 312, a case in which the reasons for the rule are adverted to at some length, it was said that among the purposes sought to be subserved by it are that the court may have an opportunity to correct or explain the parts of the charge excepted to, if it seems proper to do so, and that an opportunity may be afforded for explanations and qualifications that might otherwise be overlooked.

Where, however, as in the case at bar, the main contentions of a party are simple in their nature, are repeatedly indicated during the trial by objections and exceptions to the admission or rejection of evidence, by a motion for a nonsuit, and, either expressly or by clear intendment, in requested instructions, separately numbered, and where the rulings upon evidence and upon requested instructions, as well as the charge of the court, are manifestly inconsistent with such main contentions, and evince a clear, consistent purpose to negative or run counter to them—we contend that, the reason for the rule ceasing, the rule itself may not be invoked. The grounds for this contention we now proceed to discuss:

The legal questions raised by the exceptions taken by plaintiff in error during the trial are substantially embodied in the four main propositions urged in the

previous divisions of this brief. The various exceptions which involve and raise the main propositions referred to are covered by the assignments of error.

The first or principal one of these propositions is, in substance, that the proposal of defendant in error and its alleged acceptance by plaintiff in error did not constitute a contract, because the drawings, a material part of the contract, were never completed, and it contained a false reference, referring to specifications identified by certain marks and no such specifications are in evidence. This contention was expressly presented to the attention of the trial court, in various forms, at repeated intervals during the trial; first, by demurrers, then by objections and exceptions to the introduction of evidence which showed an inchoate and incomplete contract; later by a motion for a non-suit, and again by instructions requested by plaintiff in error and refused by the court, particularly requested instruction of plaintiff in error numbered 1, in which it was sought to have the jury instructed

> "as a matter of law, that as the drawings which were a material part of the contract were never completed, the contract was void and therefore the verdict must be for defendant."

It was also in substance reaffirmed by defendant's requested instructions numbered II and XIV (Tr. pp. 256, 260).

The second main contention was to the effect that, even assuming there was a valid contract, there was no proof of damage. The grounds of this contention, which is also obviously based on the incompleteness of the drawings and specifications were clearly brought to the attention of the trial court by the various exceptions presenting the first contention, as well as by defendants requested instruction II (Tr. p. 256).

The third main contention, to the effect that there was a variance, in certain specified particulars, between the contract alleged and the one sought to be proved, hinges on the first contention, and is clearly expressed and involved in the motion for a non-suit made by plaintiff in error (Tr. pp. 231-233) and in its requested instruction numbered II (Tr. p. 256).

The fourth main contention, to the effect that, even if the contract were valid, the action is premature, because defendant in error has never arbitrated the dispute involved in this action, as required by the arbitration clause in the contract alleged, which is a condition precedent to the right of action,—was presented by the motion for a non-suit.

The trial court was therefore fully advised as to the propositions of law which defendant urged and desired to have impressed upon the jury by the

instructions requested, but, having made up his mind as to the law of the case, did not care to have the objections of defendant elaborated.

This we think is clearly indicated in the opening paragraph of the court's charge, in which the court said:

> "Ordinarily, I would not submit the case to you at his hour, but we are rather short of jurors on the panel, and I may need your services in another case in the morning. *It strikes me that this case is a very simple one, not only in its facts but in regard to the law, and I have an idea that you will be able to reach a verdict without difficulty and without remaining out over night, or any considerable period into the night.* My hesitation about submitting a case to the jury late in the day is that possibly they might get tied up and have to stay out all night. I know that is very unpleasant, but I do not apprehend any such result will follow in this case, so I will submit the case to you now" (Tr. p. 262).

And from the colloquy between the court and counsel for plaintiff in error, before the charge, it will be observed that while the language of the court suggested merely a doubt whether the method of excepting pursued by counsel was specific enough, it was apparent that the court knew the legal objections to the charge and no desire was expressed by the court for more specific exceptions to the refusals to instruct and to the charge of the court. For after expressing this doubt the jurors were in the same breath told by the court that they might retire (Tr. p. 268).

In this connection we quote from the opinion in *Price v. Pankhurst,* 53 Fed. 312, the following language of Circuit Judge Caldwell:

> "It is of course the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging a jury. No part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards."

We do not wish to be understood as intimating that the trial court, by its anxiety for an early decision, prevented counsel from pointing out, more formally and specifically, the portions of the court's charge to which exception was taken. But we desire to suggest that in view of all the circumstances above stated counsel for plaintiff in error believed and had reason to believe that the court did not desire to hear further from him on the subject.

As shown above, the second and third main contentions grow out of or are dependent upon the first main contention; for if the alleged contract was incomplete in the important and vital element of identified specifications and of drawings showing the character and quantity of steel to be fabricated and delivered, then there was not and could not be any proof of damage, as regards steel not

shown by drawings or specifications and hence not contracted for; and if the partial, incomplete drawings made in connection with the proposal showed a tonnage of very much less than the estimated amount of 1500 tons alleged by plaintiff to have been contracted for, and a different and uncertain time of performance than the contract alleged, then there was a manifest variance between the contract alleged and the one sought to be proved.

Therefore, in the light of the evidence, exceptions and rulings during the trial, the motion for a non-suit, and the instructions requested and refused, all of them obviously involving, in one way or another, the basic contention of law that the alleged contract shown in evidence was void,—a contention expressly negatived by the opening portion of the court's charge,—it is submitted that no useful purpose would have been served by exceptions more specific than those taken by plaintiff in error.

In *Central Trust Company v. Continental Trust Company,* (C. C. A.) 86 Fed. 517, it is said (p. 523):

> "It is further objected that the specification of errors is too general and indefinite. The object of the rule in requiring the errors relied upon to be separately and particularly asserted is to enable the court to understand what questions it is called upon to decide, so it may not have to go beyond the assignment of errors itself to discover the blot, and also that the exceptor may be confined to the objections actually taken below. Van Gunden v. Iron Co., 3 C. C. A. 294, 52 Fed. 840. Where various

errors are relied on, presenting different propositions, they should be separately and distinctly set forth; *but where the errors complained of present a single proposition of law, common to all of them, there can be no reasonable objection to assigning error to the group, as was done in this case.* Andrews v. Pipe Works, 22 C. C. A. 110, 76 Fed. 170, 171. The errors complained of in this assignment go solely to the action of the circuit court in overruling the exceptions to the complainant's answer, and to the final decree, whereby the court ruled that the unpaid interest which represented the rental of the tunnel track should be a lien upon the mortgaged property, to be paid in preference to the mortgage debts. In view of the fact that the court sustained all of the exceptions made to the answer, and the principle of law arising thereon is common to each portion of the answer ruled out, and to the decree as above stated, involving, in effect, but one question, the assignment of errors is reasonably specific."

But in any event we submit that the action of the trial court, as shown by the transcript of record in giving (in its rulings, instructions and refusals to instruct), legal effect as a valid, completed contract to an instrument manifestly inchoate and incomplete,—was of such a nature as to constitute a "plain error" within the meaning of the well-known rule of this court and of the United States Supreme Court, which permits the court, at its option, to notice a "plain error", not assigned or specified. And this plain error is the basis for three out of the four main contentions of our opening brief.

In *Columbia Heights Realty Co. v. Rudolph,* 217 U. S. 547, after referring to the statutory and other provisions governing federal courts, which require particularity in the specification of errors, the opinion proceeds to say:

> "This court has, however, not regarded itself as under any absolute obligation to dismiss a writ of error or appeal because of the non-assignment of errors as required (by) Secs. 997 and 1012, Rev. Stat., having, by its rules, reserved the option to notice a plain error whether assigned or not. *Ackley School District v. Hall,* 106 U. S. 428; *Farrar v. Churchill,* 135 U. S. 609, 614; *United States v. Pena,* 175 U. S. 502."

In *Weems v. United States,* 217 U. S. 349, the Supreme Court said (p. 362):

> "It is admitted, as we have seen, that the questions presented by the third and fourth assignments of error were not made in the court below, but a consideration of them is invoked under rule 35, which provides that this court, 'at its option, may notice a plain error not assigned.'
>
> "It is objected on the other side that *Paraiso v. United States,* 207 U. S. 368, stands in the way. But the rule is not altogether controlled by precedent. It confers a discretion that may be exercised at any time, no matter what may have been done at some other time. It is true we declined to exercise it in *Paraiso v. United States,* but we exercised it in *Wiborg v. United States,* 163 U. S. 632, 658; *Clyatt v. United States,* 197 U. S. 207, 221, and *Crawford v. United States,* 212 U. S. 183. * * *"

In the case at bar the "plain error" committed by the trial court in its rulings on evidence, its refusals

to instruct and its charge to the jury is clearly apparent on the face of the record. Upon the vital point as to the existence and scope of the contract the court charged the jury that the evidence showed *"without any conflict whatsoever, that the contract was duly executed between the parties* AS ALLEGED" (Tr. p. 263). The second amended complaint alleged that the quantity of structural steel and iron required for the Columbia Theatre Building *"was estimated at 1500 tons,* and that by said contract plaintiff agreed to deliver all such material to defendant before September 1, 1907."

The court's announcement was therefore tantamount to an instruction that the parties had duly executed a contract calling for a quantity of steel estimated at 1500 tons. This statement however is absolutely without support in the evidence. As elsewhere shown, the proposal of plaintiff, introduced in evidence, proposed to furnish all the structural steel required for a building to be constructed in accordance with drawings and identified specifications to be furnished by Joseph D. Smedberg, which drawings were never made and the identified specifications are not in evidence. *Nothing whatever was said in said proposal about 1500 tons or any other number of tons.* The specifications in evidence were not the *"identified specifications"* and pointed to the drawings for information on the subject, reciting that they were "intended to cover all the structural iron work for frame and reinforced concrete in said building" and were "intended to co-operate

with the drawings for the same, both those furnished by the architect, and those furnished by the engineer, as hereinafter specified" (Tr. p. 108).

The uncertain and indefinite nature of a contract failing either to specify the amount of material required or to give any reference to existing drawings, specifications or other data by which the uncertainty could be changed to certainty, was recognized by the letter written by S. B. Harding on behalf of defendant in error, to plaintiff in error, dated December 27, 1906, in which it is said:

> "You understand that we will have to make detail drawings and have them approved before we can make any start. * * *
> Most of the difficulties in connection with all construction work of this nature is to get the matter of the drawings thoroughly understood and definitely outlined. *We then have a starting point"* (Tr. p. 86-87).

In the letter from defendant in error, by S. B. Harding, its president, dated February 12, 1907 (Tr. p. 224), it is said:

> "This job of about 1200 tons is going to drag for months at this rate, and we will have to put other work in its place *if we do not get a complete starting point."*

And defendant's Exhibit "G", being a portion of letter dated February 12, 1907, Modern Steel Structural Co. to American Pacific Construction Co., reads as follows:

> "This theater job, we estimate from the plans, to weigh about 1200 tons, and it is only

a small matter to produce such a building, *if we could have a starting point"* (Tr. p. 227).

And, as will appear from the evidence, in April, 1907, when defendant notified plaintiff to stop all work on the Columbia Theatre job, and that the same would not be finished with structural steel, the parties were very little nearer the "starting point" than they were when the above letters were written (see testimony of S. B. Harding, Tr. pp. 162, 167; testimony of W. M. Breite, Tr. pp. 234, 237; testimony of Peter Zucco, Tr. p. 241).

Because of the above facts, therefore, there was no evidence to support the legal conclusion announced by the trial court to the jury, that *"the contract was duly executed between the parties as alleged."*

In view of the allegations of the complaint and the evidence introduced over the objection and exception of defendant, the court's instruction could only lead the jury to believe that the amount of steel agreed upon by the parties was 1500 tons, the amount based on the allegations of the complaint and the *"guesses"* of defendant in error and its employees, without any reference whatever to the drawings which the proposal provided should show the material to be furnished. This belief of the jury's would naturally color all of the jury's estimate of damages, the only question which, the charge stated,

was before them for determination. This erroneous charge of the court's, aside from the error committed in failing to give instructions requested by defendant covering elements which, under the authorities shown in another part of this brief, should have been considered by the jury, was alone of such a controlling nature as necessarily to dominate the deliberations of the jury and vitiate any verdict it might render under the influence of the charge.

We therefore submit that even if the exceptions and specifications of error were not sufficient—and we believe we have shown that such is not the case—this court nevertheless *should,* in view of the "plain error" rule, consider the errors assigned.

3.

The court's rulings and instructions on the vital questions involved in this action, viz.: the existance and validity of the alleged contract and the proof of damages required, were glaringly erroneous.

It is contended by defendant in error that the charge of the trial court as to the measure of damages was correct. It is also urged, in substance, that as the evidence showed without contradiction the existence of the contract between plaintiff in error and defendant in error, as pleaded and a breach thereof by plaintiff in error, it was proper for the court to assume the existence of such contract and its breach, as alleged, and to charge the jury to that effect.

We submit that the latter of these contentions is fully answered by the argument and authorities, in the preceding pages, to the effect that, as the evidence showed that no completed contract was ever entered into between the parties, it was improper for the trial court to charge the jury "*that the contract was duly executed between the parties as alleged.*"

The contention that the charge of the trial court was correct is not supported by authorities involving elements of facts similar to those shown in the case at bar. The authorities cited in this brief demonstrate that the charge of the court, as applied to the evidence in this case, was insufficient, inadequate and incorrect, because of the omission from the charge of several important elements, necessary to be presented to the jury, and which were covered by the requested instructions.

It is now proposed to show that this insufficiency and inadequacy, either alone or in connection with the charge that the contract was duly executed as alleged by plaintiff, was of such a nature as to render it impossible for the jury to reach a determination, as to the amount of damages, that would have for its support a legal basis, or any basis other than guesswork.

In the portion of the charge which is quoted on page 34 of the brief for defendant in error, the court told the jury that the measure of damages was

> "the difference between the agreed price per ton for the quantity of structural steel which you may find from the evidence would have been required to complete the contemplated building in its entirety as provided in the contract, less what you may find it would have cost the plaintiff to have completed the fabrication and delivery of such entire quantity of steel; in other words, the plaintiff is entitled to the agreed price per ton of the entire quantity of material covered by the contract to be furnished by it, less what it would have cost to deliver it free on board cars in San Francisco, with interest and so forth".

No specific instruction was, however, given by the court as to the various elements of cost, or the offsets and allowances against estimated profits, which the jury should take into consideration in determining the amount of damages under the evidence in the case. The only instruction which the court gave to the jury upon these topics is covered by the following portions of the charge:

> "The evidence on behalf of plaintiff should be such as to enable the jury to determine with reasonable certainty, first, what the probable expense or cost would have been to the plaintiff to have performed the contract in its entirety, this to be determined from the different elements of cost involved in the work as disclosed in the testimony; and secondly, the probable gross quantity of steel, in tons, it would have required to complete the building. Thereupon, by taking the total cost to plaintiff of fabricating and delivering the material, and deducting it from the gross sum produced by multiplying the number of tons of steel you find it would have taken to complete the build-

ing by the price per ton fixed in the contract, that is, $77, the difference or result will be the profit which plaintiff would have made on the contract, and which would represent the damages which, under the law, it would be entitled to recover (Tr. pp. 265-6, Assignment 30).

"In figuring the cost to plaintiff of fabricating the steel in question, the fixed and regular monthly salaries paid by plaintiff to its permanent officers and heads of departments, without regard to this particular work, *should not be taken into account* unless you find that such item of general expense in plaintiff's business would have been increased by reason of plaintiff having to carry out the entire contract but the jury should include in the items of cost such amount as they find would be a proper allowance for wear and tear on the machinery in plaintiff's plant had the entire work contemplated by the contract been done at such plant (Tr. p. 266, Assignment 31).

"The evidence should be such as to enable you to determine the different elements which I have referred to as entering into the question of damages, with reasonable certainty; mathematical certainty is not required, but such degree of certainty as will enable the jury to reach approximately just results."

The above instructions as to the measure of damages would have been sufficient, perhaps, as applied to a case involving elements less complex and uncertain than those shown in this case for instance, as applied to a case where the contract in question would be to furnish a definite, specified quantity or number of a commodity or finished article, either carried in stock or easily obtainable

on the market, and the furnishing of which would not be affected by contracts with other parties. Such, however, was not the situation in the case at bar.

The evidence in this case involved elements of actual and probable cost which, under the authorities had an important bearing upon the determination of the amount of damages, and should have been taken into account by the jury in arriving at its verdict. The trial court, however, failed and refused to allow or give proper instructions covering these elements.

Among the matters so withheld from the consideration of the jury was that of deduction from the amount of estimated damages, on account of plaintiff's release by the stoppage of work from the burdens and responsibilities and chances of diminished profits, or of absence of profit, that would have attended the completion of performance of the alleged contract.

The alleged contract provided that delivery of the steel was to be made within a specified time after the receipt of the drawings which have been referred to, and contemplated that the steel was to be fabricated, not as a single, continuous operation, but from time to time, upon the completion of the various drawings, which were to be prepared by one J. D. Smedberg, representing the architect and also the Richelieu Realty Syndicate, with which plaintiff in error had contracted to construct the Columbia Theater building. Because of

various reasons for which plaintiff in error was not responsible, the preparation of the drawings went along very slowly. In a letter from S. B. Harding, president of defendant in error, to Thomas Vigus, general manager of plaintiff in error, dated February 12, 1907, (Defendant's Exhibit E, Tr. p. 223), about three weeks after the alleged execution of the contract in question, the writer stated that Mr. Smedberg had "approved three detail drawings thus far and we judge that there will be from 75 to 80 drawings on the building". And further on in that letter it is said:

> "This job of about 1200 tons is going to drag for months at this rate, and we will have to put other work in its place if we do not get a complete starting point at once."

It further appears from the evidence without contradiction (Tr. pp. 234, 167) that all of the drawings completed in April, 1907, when the order was given to stop work on the steel for the Columbia Theatre job, did not cover more than 256 tons. It was also shown that the plaintiff had fabricated only 39¼ tons of steel when, on April 8, 1907, it received the order to stop, it having begun the fabrication of steel under the alleged contract, in January, 1907. In this connection Samuel B. Harding, president of plaintiff company, further testified:

> "Between the dates the plaintiff began fabricating steel for this contract and the date it stopped, it had a few other small orders mixed in with it. We had other work. These orders

> filled about a quarter or a third of our capacity. * * * To fulfill the contract set out in plaintiff's complaint, one-third of the works of the Modern Steel Structural Company would be required for from sixty to ninety days after April 1, 1907, the plaintiff received and carried out contracts. * * * We did not work after April, 1907, the day on which I received the telegram to stop * * * (Tr. pp. 157, 162).
>
> "The further execution of this contract, after the delivery of the 39¼ tons, would require one-third of the capacity of plaintiff's plant and one-third of the office force, as well as the attention of the superintendents of the various departments, the general managers, and the executive officers of this company, for a period of from sixty to ninety days" (Tr. p. 165).

If the progress made with the drawings at the time the work was stopped, as shown by the evidence above, is taken as a basis for an estimate as to time of completion, plaintiff's guess of from sixty to ninety days was far too small. The evidence showed that, under the conditions existing as regards the preparation of the drawings—conditions for which plaintiff in error was not responsible or chargeable, and which the defendant in error had knowingly accepted—the completion of the drawings might have been delayed for a much longer period than that estimated by Mr. Harding.

By the stoppage of all work under the alleged contract the defendant in error was thereupon freed from all of the delay, risk, annoyance and uncer-

tainty which would have been incident to completion of the job under conditions such as those complained of in plaintiff's letter to defendant of February 12, 1907 (Tr. pp. 222-224), and in the plaintiff's letters of January 25th and 31st (Tr. pp. 188-189, 196) and such as would attend the performance of a contract extending over a considerable portion of time. The profits, if any, arising from a delayed and protracted performance would obviously be much less than those which would be derived from prompt and continuous performance.

In view of the foregoing evidence, and of other similar facts shown by the record, we submit that the element of time saved to plaintiff by its release from further performance was a very substantial one, and should have been covered by the court's charge to the jury. This element was covered by the requested instructions of plaintiff in error numbered VI, VII and IX (Tr. pp. 258-259; Assignments of Error Nos. XVI, XVII and XIX); but the court refused to give the same, and did not cover the subject at all in the charge to the jury.

That the element referred to is a substantial one which should be taken into consideration by a jury in estimating damages in a case of this kind, is established by decisions of the highest authority.

See

U. S. v. Speed (supra);

Hinckley v. Pittsburg Bessemer Steel Co., 121 U. S. 264,

and authorities cited in earlier portion of this brief.

The charge of the court was incorrect and inadequate in the further particular that the jury were not properly instructed as to the caution to be observed in estimating the amount of damages where the tangible facts offered as a basis for arriving at such amount were so incomplete and uncertain. Because of the unfinished condition of the drawings and the delay and uncertainty that were attending the completion of the alleged contract, there was a marked absence, in this case, of the kind of facts and data which the authorities regard as necessary in the ascertainment of legal damages. The situation shown at the close of the evidence was one calling urgently for cautionary instructions as to the necessity for satisfactory evidence of the various elements affecting cost, and for the avoidance of speculation or surmise in determining the question of damages. By defendant's requested instructions numbered II, III and IV (Assignments of Error Nos. XII, XIII and XIV; Tr. pp. 256-258; 281-282) defendant sought to have the jury instructed as to these matters, but the requested instructions were refused, and no adequate instruction of a similar nature was given by the court. That instructions of this kind, as applied to facts similar to those shown in the present case, are proper and necessary, is well established by the authorities:

On this subject, see the language of the court in the leading case of *Masterton v. Mayor,* 7 Hill, 61;

42 American Decisions, 38, at page 45, and the other authorities heretofore discussed.

In view of the evidence shown in this case, another serious omission in the charge to the jury was the trial court's failure to give instruction numbered X (Tr. p. 259); Assignment of Error No. XX, Tr. p. 285), or to give any instruction of a similar nature. By the requested instruction the jury were told, in substance, that if they should find there was a contract, it was nevertheless the duty of defendant in error not to allow its plant to remain idle, but to use every reasonable effort to procure other work and if it did procure other work to take the place of the work mentioned in said contract, during the time it would be employed in the performance of this contract, the jury should deduct the amount of profits made by it on such other work from any sum the jury might find defendant in error was entitled to under the facts of the case.

As shown by the evidence previously quoted, the capacity of the plant in 1907 was 80 tons per day. S. B. Harding testified that, to fulfill the alleged contract one-third of the plant would be required for from sixty to ninety days after April 1, 1907 (Tr. p. 157 et seq.). This testimony was of course on the assumption that the drawings were completed; but as we have previously shown, at the rate of progress made up to April 1st, it would have

taken some months to finish the drawings alone. In view of the evidence referred to, showing the limited capacity of the plant, and that the job was going to be a long-drawn-out one, it is apparent that the work would have been performed but a little at a time, and, consequently, that the defendant in error could in all probability, within the period likely to be required for full performance, have obtained other work to replace all or a large part of the work that would have been performed under the alleged contract had it not been breached. That the court's omission to give the instruction referred to, or a similar one, was an error, is supported by the following, among other authorities:

In *Page on Contracts,* Section 1583, it is said:

> "It is the duty of the party not in default to use such means as a reasonable and prudent man would use to mitigate damages. On the one hand the party not in default cannot recover for damages which follow a breach, but which might have been prevented by such means. * * *"

See also,

Rochm v. Horst, 178 U. S. 1, at pp. 11, 15, 20, 21;

Sedgwick on Damages, (9th edition), Section 201.

In the opening portion of this brief assuming for the purposes of the argument the existence of the alleged contract, and taking as a basis the figures of actual cost, shown on plaintiff's cost

sheet of the 39¼ tons of material delivered at the time work was stopped, we showed that the profit derived from the alleged contract, on a 1200-ton basis (being the basis mentioned in several of plaintiff's letters (Tr. pp. 224, 227) would not have exceeded $475.97 if *"overhead expenses"* were chargeable to costs. This on the figures and testimony, of defendant in error. And after making deductions for depreciation, cost of materials, drawing, templates, power, allowance for exemption from risk and trouble attendant upon full performance of a long-drawn-out contract the apparent profit would be swept away and would become a heavy loss.

In the brief for defendant in error (Tr. pp. 75-78) these figures and results are criticized and are amended so as to show that a much larger profit would have been obtained by plaintiff, on the basis of the figures in the cost sheet. This result is obtained by defendant in error (1) by changing the relative tonnage of the theatre portion and the office portion, (2) by assuming a larger proportion of drawings completed at the time work was stopped, and (3) by eliminating, *as a supposed duplicate estimate, the figure of $4.10 per ton mentioned in our figures* as the cost of drawing labor for the theatre portion.

We shall discuss these criticisms in their order:

1. *As to relative tonnage of office portion and theatre portion.*

In the brief for defendant in error it is contended that our statement that fifty per cent in weight of the building belongs to the theatre portion is a serious error; and the testimony of F. W. Harding is quoted to the effect that from 30 to 50 per cent of the building, according to the open space on the plans, would be occupied by the theatre, and that the tonnage of the theatre portion would not exceed 20 per cent of the whole work in the building; and that, on the basis of a 1200-ton building the steel tonnage would be, for the office portion 950 tons and for the other portion 240 tons.

From the testimony of F. W. Harding it is very doubtful whether he had the technical training or experience necessary to qualify him to give a dependable estimate of tonnage. At all events he had not been accustomed to making such estimates; and his testimony clearly indicates that his supposed estimates of tonnage in this case were really not estimates but guesses of the vaguest character.

The witness testified that he was vice-president of plaintiff company, which office he had held "for the past three months"; prior to which time he was treasurer for five years, having been elected to that office in 1907, when he was directing manager and one of the directors. He further said:

> "I have done a great deal in behalf of my company in taking contracts, although it never became part of my duty to remember quantities, but I was required to place valuations on work. The estimating of quantities would be done by our clerical force" (Tr. p. 182).

But aside from the question of the witness's ability to estimate quantities, it appeared from his own testimony that his estimate of the quantity of material required for the theatre portion or for any portion of the building in question had no tangible basis to support it. Thus, in reference to his estimate of tonnage for the completed building, he said:

> "I could not take the quantities to determine that. I had to take the cubic foot rule, because the general drawings were not completed for the entire building. The building was a combination of both office and theatre building. * * * There were some store buildings in the bottom or in the first story, and then came the theatre portion of which there was quite a lot of open space where the theatre portion was, and above that, and I think partly on the sides, was more or less office construction. That is in a general way, as I remember it" (Tr. p. 201).
>
> "The papers that are annexed to the deposition of S. B. Harding are all of the detail drawings and are all of the drawings that were prepared by the plaintiff, and the 31 and 28 sheets of drawings that have been offered in evidence, and which were annexed to the deposition of S. B. Harding, are only for the first part, that is, the stores and first and second story columns and some of the connecting beams. They more or less refer to the office building proper and none of the truss work for the theater proper had been done (Tr. pp. 201-2).

And at page 227 the witness further testified:

> "In a general way we knew that it was to be a steel frame structure of so many cubic feet, and taking the cubic-feet rule we arrived at the tonnage."

That the so-called cubic-feet rule affords no valid basis for the estimation of quantities in a case of this kind, the only accepted basis for such estimates being the detail drawings, seems to us an obvious proposition. At all events, this is clearly shown by the testimony of the witnesses for defendant, structural engineers who were thoroughly familiar with the design and construction of theater and office buildings, and who were not parties to or interested in the result of the action. The testimony of these witnesses was not disputed and was based upon a careful examination of all of the drawings and other exhibits attached to the deposition of S. B. Harding. All of these witnesses testified, in substance, that there were no drawings or designs from which it was possible to determine the tonnage that would go into the building in question. C. H. Snyder, a contracting engineer of 12 years' experience, who had formerly been a structural steel draftsman, and who had in the last 12 years estimated the quantities and given prices and quotations for the work on 60 or 70 buildings, among them several theaters, testified (Tr. p. 246) that the theater portion would occupy more than half of the ground space and up to the sixth story of an eight story building.

John D. Galloway, a civil engineer,—that term including, according to his statement, structural engineer,—testified that he had been in the business for 23 years, and had designed the steel work for several

buildings and prepared the detail drawings for the steel work. He further testified:

> "The plans are incomplete, but, assuming the information to be correct that this portion was to be occupied by a theater, so far as the cubical contents were concerned, the theater would have occupied considerable more than one-half of the building. In addition to the portion which is bounded by the curved line that I speak of, I would say that the curved line would indicate that this is the portion formed by the galleries of a theater, and it is necessary to have, back of those galleries, there is aisles and foyers and places which are taken up by the exits. With those ideas, I would say that the space shown would be taken up in this way, and that that part to be occupied by the theater would have been considerably more than fifty per cent. I should judge, without any actual measurement, that at least 75% of it would have been the theater portion" (Tr. pp. 247-249).

From the foregoing testimony we submit that the assumption of defendant in error that the tonnage of the theater portion was only 240 tons had no foundation on which to rest.

2. *As to the portion of the drawings that were prepared when work was stopped, and the estimated cost of completing the remaining portion.*

The assertion of defendant in error that "the expense of the drawing work for the office portion of the building had practically all been taken care of" is not supported by the testimony. The testimony of W. M. Breite, for 20 years a structural en-

gineer and who had designed steel work for a large number of theater and other buildings, was that the completed drawings attached to the deposition of S. B. Harding, included in all 256 tons, and "only covered the office portion of the proposed building." The assertion in the brief for defendant in error that "owing to the fact that in an office building the structural work of each floor is practically the same, most of the detail drawings which were gotten out for the first floor would serve equally well for the others above, with the possible exception of the 8th floor", is based upon an assumption that is not supported by the evidence, either as a general proposition or as applied to this particular case, While Mr. F. W. Harding claimed in his testimony (Tr. p. 254) that there was "considerable duplication" it is to be remembered that he also testified (Tr. p. 225) that

> "until we have that design (from the architect) we don't know what the members are going to consist of absolutely. If we were engineers we could, otherwise we cannot use our own judgment in a matter of that kind. We have to wait for the architect".

No structural engineer testified for defendant in error on this point, and therefore in support of the intimation that by reason of the completed drawings the cost of the remaining drawings would be decreased because of duplication, we have only the vague assertion of an officer of defendant in error, confessedly not qualified to speak upon this sub-

ject. As against this, we have the testimony of Breite, Zucco, Galloway and Snyder, structural engineers with long experience, to the effect that about 10% of the detail drawings for the work had been completed.

We therefore insist that the estimate in our opening brief of $6692.80 as the cost of drawing work is supported by the evidence and is correct.

3. *As to the figure of $4.10 per ton for drawing labor of theatre portion (brief of plaintiff in error, p. 94).*

In the brief for defendant in error it is said (p. 77):

> "Counsel's claim for generous treatment in his analysis, in that he is only charging $4.10 per ton for the detailed drawings of the theater portion, when F. W. Harding had stated it might be $5.00, becomes more apparent than real when we find him adding per ton in this statement, $4.10 to $6.00 and over, which had already therein been charged in the figures $6,692.80 as the drawing cost; making nearly $10.00 per ton for the theater drawing details, a figure largely in excess of that named by defendant's most enthusiastic witness."

On the theory that our figures based on the "cost sheet" duplicated the sum of $4.10 in the drawing costs this sum is omitted in the figures made by defendant in error.

Counsel have erred grievously. They misunderstand our figures. Our estimate of the drawing costs fixed $6692.80 as the total drawing cost for an ordi-

nary store and office building containing twelve hundred tons of steel. But the building in question was a combined office and theatre building of which the "theatre" constituted at least one half. And the evidence shows that the drawing work for a theater is more difficult, and the drawing costs for such work are at least $4.10 per ton more than for the other class of work . (Testimony W. W. Breite, Tr. pp. 236-237; J. Galloway, Tr. pp. 248-249; C. Snyder, Tr. p. 242.)

4.

Plaintiff in error was not estopped from requiring legal proof of the alleged damage or from urging the invalidity of the contract.

It is indeed novel to contend that in an action for breach of contract the party in default may not require legal proof of the alleged damage to the complaining party. It is so unique that there is no authority to support this contention. Its absurdity is apparent from its mere statement and would not be noticed had not defendant even cited in its support the case of

Seymour v. Oelrichs, 156 Cal. 782.

An examination of the case cited will show that it is not applicable to the case at bar. In that case, a husband duly authorized to bind his wife and her sister by a contract employing an overseer of the wife's and sister's real estate, agreed to employ

the plaintiff, Seymour, for ten years at a specified monthly salary, and thereby induced Seymour to surrender a life position in the San Francisco Police Department and to enter on his duties as overseer. Seymour would not have left the life position unless he had been assured of a permanent position, and the husband knew that fact. Every one of the terms of the agreement between himself and Seymour had been defined and understood by them, orally. Under these circumstances, the court held that the wife and sister were equitably estopped from repudiating the oral contract on the ground that it was not reduced to writing as required by the statute of frauds.

Here, however, the terms of the agreement never were fully agreed upon between the parties. As has been pointed out, the defendant in error, just prior to the time it was alleged the contract was entered into, was fully aware of the incomplete nature of a contract to furnish material without existing drawings and specifications and that until they were definitely understood and outlined, defendant in error did not have a "starting point" (Tr. pp. 87-224-227). It knew this, but went ahead and took the chances, as the American Pacific Construction Company necessarily did in its relations with the Richelieu Realty Syndicate. The matter of completing the drawings rested between the defendant in error and J. D. Smedberg who represented, not the plaintiff in error, but the architect and the Richelieu Realty Syndicate (see specifications,

Tr. p. 107; deposition S. B. Harding, Tr. p. 104). Notwithstanding the incomplete condition of the drawings and specifications and the situation in which the plaintiff in error was placed by the change of the financial condition of the Richelieu Realty Syndicate, plaintiff in error endeavored to reach an adjustment with the defendant in error at the time the order was given to stop the fabrication of steel and for some time thereafter.

The case of *Seymour v. Oelrichs* has no application here for the reasons stated and for the additional reason that independent of the invalidity of the contract the law required proof of the alleged damage.

Conclusion.

The character of the action and the necessity of quoting the evidence is our excuse for the great length of this brief. A complete treatment of all the material parts required unavoidable repetition.

However, it is respectfully submitted that every point suggested by the defendant in error has been met squarely, and fully answered. It is also submitted

1st. That the alleged contract is void because:

(a) The drawings and specifications were never completed.

(b) The reference in the "*proposal*" to identified specifications is false. No such specifications are in evidence.

(c) No specifications were attached to the "proposal".

2nd. There is no evidence that defendant in error was damaged.

3rd. That the contract sought to be proved was different in its essential terms from the contract alleged.

4th. That the action should not have been instituted until after the differences between the parties had been submitted to arbitration.

It is finally submitted that the record shows that this action is really an effort on the part of the defendant in error to coin the misfortunes of the Richelieu Realty Syndicate and of plaintiff in error into money for damages which it never sustained.

Upon the grounds and reasons set forth in this brief we respectfully ask that the judgment of the court be reversed.

Respectfully submitted,

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